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HEARINGS

BEFORE THE

SUBCOMMITTEE ON JUDICIARY

OF THE

COMMITTEE ON THE DISTRICT OF COLUMBIA

OF THE UNITED STATES SENATE

ON THE BILL

S. 10136

PROVIDING FOR THE PROTECTION OF THE INTERESTS OF THE UNITED STATES IN LANDS AND WATERS COMPRISING ANY PART OF THE ANACOSTIA RIVER, OR EASTERN BRANCH, AND LANDS ADJACENT THERETO, AND FOR OTHER PURPOSES

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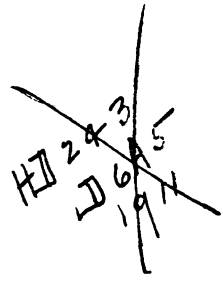
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FRIDAY, FEBRUARY 10, 1911.

COMMITTEE ON THE DISTRICT OF COLUMBIA,

February 10, 1911.

The committee met at 11 o'clock a. m.

Present: Senators Burkett, acting chairman of the subcommittee, Dillingham, and Gamble; also Senators Gallinger, Scott, Carter, and Smith of Maryland.

Also Mr. Stuart McNamara, special counsel, Department of Justice; Mr. H. C. Gauss, special assistant to the Attorney General; Mr. R. T. Strickland, attorney in charge of titles, Department of Justice; and Mr. W. H. Arnold.

Senator BURKETT. I think I will first put into the record a copy of a letter from the Acting Attorney General, J. A. Fowler, with reference to this bill, and also a copy of a letter written to the Attorney General by the secretary of the commission appointed to take up this matter. Those letters give a brief explanation of the matter.

(The letters are as follows:)

DEPARTMENT OF JUSTICE,
Washington, January 19, 1911.

SIR: In connection with Senate bill No. 10136, Sixty-first Congress, third session, introduced by Senator Scott on January 10, 1911, providing for the protection of the interests of the United States in lands and waters comprising any part of the Anacostia River, or Eastern Branch, and lands adjacent to, and for other purposes, I send herewith a copy of a report to me, made by the secretary of the commission, created under section 26 of the act of May 30, 1908 (35 Stat. L., pt. 1, p. 543), to investigate the title of the United States in and to all lands in the District of Columbia, wherein are fully set forth the necessity and reasons why said bill should be enacted by Congress.

Said report is in regard to sections 1 to 7, inclusive, and does not cover section 8 of the proposed act.

As to section 8, you are advised that heretofore proceedings for condemnation of lands in the District of Columbia have been carried on under the act of August 30, 1890 (26 Stat. L., 412–413), making provision for the acquisition of land for the enlargement of the Government Printing Office in this city.

It is intended that section 8 of the proposed act will to some extent simplify the procedure for condemnation.

Under the act of August 30, 1890, in making provision for the payment of awards it is provided that—

"In case any of such persons are under disability, or can not be found, or neglect to receive payment, the money to be paid to any of them shall be deposited in the Treasury to their credit."

Under said act of August 30, 1890, if the name of the owner or ownership of the property can not be positively ascertained, a deposit or payment could not be made, which might cause delay and possibly defeat the acquisition of land should any question be raised on this point.

Respectfully,

J. A. FOWLER,
Acting Attorney General.

Hon. JACOB H. GALLINGER,
United States Senate, Washington, D. C.

DEPARTMENT OF JUSTICE, *January 18, 1911.*

SIR: My attention having been called to Senate bill No. 10136, providing for the protection of the interests of the United States in lands and waters in the District of Columbia, I have the honor to make the following report on so much of the said bill as affects the subjects which have been under investigation by the commission to investigate the title of the United States to lands in the District of Columbia.

The historical facts indicate, and the Supreme Court has decided, that it was the intention, when the city of Washington was laid out, that the entire water front should be preserved for the use of the people of the city in general. After protracted litigation, the claims of private persons to control a very large proportion of the Potomac River water front were denied and the title held to be in the United States. A portion of the Potomac River front west of Twenty-seventh Street from C Street to I Street and of the Rock Creek front west of Twenty-eighth Street between I and K Streets is now in a similar condition as to title as was the whole of the Potomac River front prior to the decision of the Potomac Flats case.

By section 1 of Senate bill No. 10136 the method of procedure followed in the Potomac Flats case is authorized with reference to the remainder of the water front of the city of Washington, and sections 3, 4, 5, and 7 are identical with the sections in the act approved August 5, 1886 (24 Stats., 335), conferring equitable jurisdiction on the supreme court of the District of Columbia and prescribing the details of procedure in the suits to be brought under the authority of section 1. The questions affecting the portions of the river and creek front hereinbefore described are almost identical with those settled in the Potomac Flats case, and the value of the land affected as a means of connection between the Potomac Park system and the Rock Creek Park system is so great that no right of the United States could be allowed to lapse or be jeopardized without expensive results. While within this portion of the city it may be found that certain private rights have accrued, the underlying property rights of the United States are such that the procedure recommended seems to be not only that best calculated to determine the respective rights of the United States and private parties, but that which seems absolutely essential for the proper protection of the interests of the United States.

The question of title on the Anacostia River front from the southern terminus of the land affected by the Potomac Flats case to the northern limit of the original city of Washington has been debated for many years and the property is in a condition as to title which is almost chaotic. There seems to be no doubt that the original commissioners intended, as previously stated, to reserve the water front for the general use. They apparently found, however, that the pressure from persons of influence was too great to enable them to carry out their intentions inflexibly, and, partly with the consent, actual or tacit, of the original commissioners, and partly by the unopposed irregular action of individuals, certain structures have been built on the soil of the Eastern Branch, its shores and adjoining land, and certain claims of ownership have been and continue to be made which, according to the facts as they now appear, and in the light of the Potomac Flats case, seem to be encroachments on and denials of the property rights of the United States.

In particular, one square (803), which is assessed to the United States and which appears always to have been its property, is adversely occupied by private parties claiming under a chain of title which runs back for a great many years, but which apparently has no basis in any valid grant from the United States. In addition to this, the proposed location of a branch track from the United States. In addition to this, the proposed location of a branch track from the Pennsylvania Railroad to the navy yard has raised questions of title affecting land extending for about one-quarter of the distance of the entire water front of the city on the Anacostia River. These questions apparently can not be satisfactorily settled except through proceedings contemplated by section 1 of this bill. The improvement of the Anacostia River has probably been obstructed during the whole history of the city of Washington by the unsettled condition of the titles along its banks within the limits of the original city of Washington, and the clearing of such titles seems to be a necessary preliminary to the serious consideration of this instrument.

The property on the Potomac River, Anacostia River, and Rock Creek affected by section 1 of this bill is of very great importance, and seems likely ultimately and in any event to be acquired by the United States for public improvements. The property on the Potomac River and Rock Creek is directly in the line of a

proposed extension between the Potomac Park system and the Rock Creek Park system, and the property on the Anacostia River would have to be acquired by the United States in order to carry out any comprehensive plan of improvement of the shores and lowlands of that river.

The questions of title involved are so complicated that under usual procedure they could not be settled for many years, if, indeed, they could be settled at all. But by giving the supreme court of the District of Columbia equitable jurisdiction a means seems to be provided to secure a speedy and final settlement of all questions to be met.

The lands affected by section 2 of the bill constitute four classes.

One class is that of the small amount of land in the original city of Washington which was not divided, so far as the records show, between the original proprietors and the public in accordance with the deeds of trust given by the said proprietors in order to carry out the purpose they had in mind of securing the location of the Federal city within the limits given in the said deed of trust. Any other method of completing the records of division than that proposed would present serious difficulties from the questions which would be raised as to the person or persons who would have power to take action under the deeds of trust at the present time. The method proposed would provide against all possible outstanding claims, and while the amount of land affected is not large, some action of this character seems necessary in order that certain rights of the United States based upon this division under the deeds of trust may be properly asserted.

A second class of lands affected by this bill consists of lots in the original city of Washington to which the mere naked legal title seems now to be outstanding in the United States. This condition seems to have been brought about by the fact that up to 1838 the law of the District of Columbia required that conveyances of land must be recorded within six months in order to have legal effect. While it has been questioned whether this provision applied to certificates of sale issued by the original commissioners, the general construction and the course of dealing with such matters seems to indicate that if these certificates were not recorded within six months they failed to convey the legal estate. A considerable number of original lots in the city of Washington, including some which are now improved by valuable buildings, are affected by this condition, and while there is no actual financial interest of the United States in the property in these cases the record title appears to be in the United States. Any other method of attempting to clear title than the equity proceedings proposed in the bill, or an act of Congress in each case, seems to raise questions of considerable difficulty, and the equity proceedings seem to be preferable in view of all the circumstances.

By section 2 of the act the court is given power, if it finds the outstanding title to be a naked legal title merely, to make such decree as may be necessary to vest the legal title in the person equitably entitled thereto, thus offering a speedy remedy for technical defects which are the basis of the only interest of the United States in this class of lands.

A third class of lands includes those lots in the city of Washington for which the United States has apparently never been paid and which are in the adverse possession of private persons. This property includes the whole of one square, nearly the whole of another, and isolated lots in different squares throughout the city. The persons who are now in possession probably acquired their interests without positive knowledge that they were infringing upon rights of the United States. The United States apparently has let its rights with relation to these lots lie dormant for a great many years, and while this fact has no bearing as a matter of law, it appears from the experience that has already been had, that it would be difficult to secure recoveries by proceedings in ejectment, which proceedings seem to be the only method available, except the method provided in this bill.

One such case has already been tried—that relating to a piece of land located in the vicinity of Fifteenth Street, Florida Avenue, and New Hampshire Avenue, known as "Fox's Discovery." This proceeding was brought in ejectment, and there is reason to believe that notwithstanding the instructions of the court that lapse of time or length of possession was not to be considered as affecting the rights of the United States the jury did take such facts into consideration, and there is reason to suppose that they were influenced in their verdict for the defendants by the view that the United States was practically in no different position from a private person after having allowed its rights to lie dormant for so many years.

It would appear to be a hardship to require of the present occupants of such lands the full present value thereof, especially where the occupants appear to have been purchasers for value and under the impression which has obtained in real-estate dealings in the city of Washington that the rights of the United States, having been allowed to slumber for so many years, would not be revived.

Even if proceedings in ejectment could be undertaken by the United States without the difficulty as to the view of a jury which has been suggested, there would be no alternative but to seek to recover the land at its full present value, and to include a count for use and occupation. Otherwise a claim for improvements under the terms of the code of the District of Columbia might require a payment by the United States to the occupant. In case of success also the United States, after a proceeding at law, would have the difficult question of realizing on its verdict, while in case of a verdict for the defendant the result would be not merely negative as to the enforcement of the claim of the United States, but positive in its affirmation of title in the occupant and the exclusion of the United States from further assertion of its rights.

The proposed bill has been framed to avoid the hardship suggested and at the same time to secure the desirable result that valid rights shall not be divested from the United States without due payment, and the court, in section 6, is given the power to make a valuation of the rights of the United States in any such land according to the equity and good conscience which should be exercised by the United States, taking all the circumstances of each case into consideration.

It seems especially important that the titles referred to as in the second and third classes should be completely cleared up at this time. The uncertainty of real-estate titles in the city of Washington has been the subject of comment for many years. It has been the custom to pass titles as good, notwithstanding that the interest, title, or right of the United States had not been completely divested. Under certain constructions of law which seem rather ingenious than sound, or in consequence of a general assumption that the United States would continue to allow its interest to lie dormant, these titles have been passed as a matter of convenience and to avoid the delays which would result from an effort to secure congressional action to cure the defects. At the same time the condition could not fail to create comment and, in some cases, criticism when called to the attention of persons previously unfamiliar therewith, and there have been, including the present investigation, at least four distinct general investigations as to these titles, as a result of which attention has been called to various outstanding interests, but no method has been proposed until the present bill for making a comprehensive settlement of questions involved. The reports of Robert Ould, William Cave, and John Stewart, respectively, indicate that a very large amount of time was expended in these researches. Aided by the researches of the former investigators, the present commission is or will be able to state positively the nature of the various defects in title arising out of dealings by the United States in building lots in the city of Washington, and the present bill is proposed as a definite means of terminating the difficulties and of rendering it unnecessary to make a further investigation at a later date, when the details of the present work shall have been somewhat obscured by time, as have been the details of the work of the previous investigators.

If action is taken now, as suggested, and the means afforded to perfect these titles, it will then be possible to issue an official publication, stating the basis of all real-estate title in the original city of Washington and giving a sound foundation for the abstracts of title which are essential to the assurance of persons who may invest in real estate. If the matter is allowed to lapse, as it has been allowed previously to lapse, except for the gifts of rights of the United States authorized by the act of March 3, 1899, and acts of Congress relating to individual cases, there is every reason to suppose that at least a portion of the work now being done will have to be done over again by a future generation, while in the meantime the danger of expense or loss to private individuals arising out of imperfect real-estate titles will continue in an increasing degree as the lapse of time disposes of evidence and prevents easy ascertainment of the actual facts with regard to the original transactions.

The fourth class of cases is largely presumptive, but the inclusion of such cases in the legislation proposed will complete the means available to the United States for asserting all its rights to lands and waters within the District of Columbia. There was, of course, no vacant land left in the original city of Washington after the metes and bounds of the said city were laid out, but there was some account of such land elsewhere in the District of Columbia,

some of which has been patented. There is always a possibility that between the lines of old patents a minute scrutiny would disclose portions of land not included within the lines of any patent, and the rights of the United States to such lands should be safeguarded by a provision for the determination of any question which may arise on further investigation as to vacant lands outside of the city of Washington in the District of Columbia. The provision in section 2 relating to vacant lands was included to provide for such contingencies. While it is possible that no proceeding will be brought under this provision, there is a possibility of a situation in which such a provision would be of considerable value to the United States.

This bill does not involve any expenditure on the part of the United States beyond the amount named in the bill, or commit the United States to the acquisition of any private titles. The valuation of private rights which may be found to exist is to be reported to Congress for its consideration and action, while, except as to naked legal titles, the valuation of any right of the United States will be similarly reported, and Congress can then take such further action with relation to the rights of the United States as it may deem advisable, either by directing the disposition to be made in each case or by giving general powers to some administrative officer, presumably the Secretary of War, who is the immediate superior of the Chief of Engineers, who seems to be the successor of the original commissioners of the city of Washington.

Very respectfully.

H. C. GAUSS, *Secretary.*

The ATTORNEY GENERAL.

Senator BURKETT. I suppose those who have drawn this bill, as representing the commission, should be first heard to explain it. Will you speak first, Mr. Gauss?

Mr. GAUSS. Mr. McNamara is here.

Senator DILLINGHAM. I have had placed in my hands a letter from Joseph I. Weller, relating to this bill, inclosing a letter from the committee on municipal legislation of the Chamber of Commerce, requesting unfavorable action on the bill. I ask to have those letters also put into the record.

(The letters are as follows:)

WASHINGTON, D. C., *February 10, 1911.*

MY DEAR SENATOR GALLINGER: On January 20, when I requested that I be granted a hearing on Senate bill No. 10136, providing for the protection of interests of the United States to certain lands in the District of Columbia, etc., the bill had not been considered by the Washington Chamber of Commerce, but since my request said body, of which I am a member, has considered this bill, and I therefore take the liberty of inclosing you a letter from the committee on municipal legislation of the chamber, requesting unfavorable action on this bill.

Yours, very respectfully, JOSEPH I. WELLER.

Hon. JACOB H. GALLINGER,
Chairman Committee on the District of Columbia,
United States Senate, Washington, D. C.

WASHINGTON CHAMBER OF COMMERCE,
COMMITTEE ON MUNICIPAL LEGISLATION,
February 10, 1911.

Hon. JACOB H. GALLINGER,
Chairman Committee on the District of Columbia,
United States Senate.

SIR: The committee on municipal legislation of the Washington Chamber of Commerce having given consideration to the Senate bill No. 10136, respectfully requests unfavorable action on said bill for the following reasons, namely:

Chapter 15 of the Code of Laws of the District of Columbia entitled "Condemnation of land for public use," being sections 483 up to and including section 491 M, being the law as passed by Congress with the amendments thereto,

gives to the Government of the United States and the District of Columbia all the powers needed for the condemnation of land for the United States and the District of Columbia, and the successful operation of condemnation proceedings both by commission and jury under this chapter and various sections of the code has been very successful, and under said sections large tracts of land have been acquired and title vested in the United States and the District of Columbia.

The various sections have been tested by the appellate court and sustained. At present these sections of the code are clearly understood and is the law governing the condemnation of land for public use, and it would appear that there is no requirement for the proposed measure.

Section 1 of the bill is unnecessary, as the Government has the same authority under an ejectment proceeding that could be maintained in its behalf under said section, and in the said ejectment proceeding the title could be ascertained to the same extent as by the proposed bill. Recently the United States, in a case in the supreme court of the District of Columbia, brought such a suit, the title being U. S. A. *v.* A. E. T. Hansmann (Law No. 48883), and U. S. A. *v.* Wm. H. Lewis (Law No. 48884), commonly known as the Fox Discovery case; wherein the entire matter was considered as completely as the Government could do under section 1 of the proposed bill.

Section 2. The extraordinary power attempted to be vested in the Attorney General by this section would unsettle and disturb all existing titles to land in the District of Columbia and a proposed purchaser of any property in good faith might become the subject of this proceeding, even though there has been no question as to "the fair and equitable division between the public and the original proprietors of the land."

In other words, the law is well settled that when for many years the title to property is not questioned, it would be unfair, when the Government has permitted owners to purchase and convey land, at the expiration of over 100 years, to raise the question whether the original division was fairly and equitably made, or whether the lands have been fairly and equitably divided between the public and the original proprietors of the land. An attack of this kind after so many years would be not only inequitable, but would be outrageous, the Government having acquiesced in the division for these many years. If, however, there has been any unfair or inequitable divisions which have been notorious and known as such, and the title taken by persons cognizant of this fact, a different condition would arise. To say, however, that whenever deemed warranted by the Attorney General, that he could arbitrarily disturb existing titles because he or those who advise him, believe the land had not been fairly or equitably divided between the public and the original proprietors of the land raises a condition of affairs that should not be tolerated in this or any other community. It is certain of belief that Congress would not permit the owners of the land in this District to suffer this hardship and place a cloud on every parcel of ground in the District; because at no time could the owner tell when, for some reason or other, the question might arise as to whether his land had been fairly and equitably divided or not, or whether his land came within the purview of this unfair section.

If, however, the Government has any rights by reason of land being held by individuals that is the property of the Government, it has at the present time a legal and equitable remedy, and in the past the Government has not hesitated by appropriate proceedings to obtain the possession as well as the property it claims.

Section 3. The Government now has the right to maintain suit in equity without the necessity of passing this bill or section 3 thereof.

Section 4. This section is unnecessary, as all the authority required is now reached in an equity court or in a court at law by appropriate proceedings, and the drastic measure proposed in this section, that all parties who shall fail to appear shall be forever barred from setting up or maintaining any right, title, interest, or claim in the said premises, does not consider the rights of infants or lunatics. Further, this section should not be as drastic as to determine every right, title, or interest arising in the premises and to vacate, annul, set aside, or confirm any claim of any character arising or set forth in the premises;" for the reason that any caim that the Government might have should be set forth in a bill in equity or in an ejectment proceeding that can be filed at the present time so that the same can be fairly met by the defendant; and the court should not have any other power or jurisdiction than is prayed for in the bill of complaint filed by the Government.

Section 5. Takes away property from a citizen without a commission or jury passing upon its value and leaves the power in the court in a summary way to proceed to ascertain the value of any such right, title or interest, or claim, exclusive of the value of any improvements to the property covered by such right, title, or interest made by or under the authority of the United States, and report thereof shall be made to Congress. Thus by this section a cloud will be placed upon the property of the citizen, the amount that he should be reimbursed therefor is ascertained by the court, but he must thereafter await the action of Congress before he could have the free use of his property or obtain the amount which it is determined he is entitled to receive.

The owner of property has a right to have this value ascertained in a competent way and not in a summary way by the court or a justice thereof. As to whether or not he has any title or interest in the land should not arbitrarily be passed upon by the court or judge, but should be passed upon by filing appropriate proceedings as now can be done under the law now in force in the District of Columbia.

Section 6 provides to the same extent, giving the court in a summary way the right to ascertain the value of the right, title, or interest of the citizen, and report to Congress, and thereby places the owner of the property at the same disadvantage, placing the same cloud upon his title and leaving it optional with Congress and the future action of Congress may take in the premises. Surely a citizen should not be placed in this position, or his property rights jeopardized in this manner. He should have a right to have the value of his property determined by those competent to pass upon its value after a complete examination thereof, as now required by law.

To say that "the court shall fix its valuation of the land by considering all the circumstances relative to the acquirement and conveyance of land by the United States within the District of Columbia, and the said valuations and the said decrees shall be such as may be, in the opinion of said court, required of the United States by equity and good conscience," is to leave the matter to the court without a proper guide as to the valuation of the land, especially as the court is to base its opinion on the circumstances relative to the acquiring and conveyance of the land. This is, as before stated, not a fair and equitable provision.

Section 7 provides for appeal from the supreme court of the District of Columbia direct to the United States Supreme Court, but makes no provision for an appeal from the supreme court of the District of Columbia to the court of appeals and makes it a burdensome expense on the owners of land which should be avoided.

Section 8 in no way applies to the previous sections of this bill and is an unnecessary section, because the law is fully covered by chapter 15 of the Code of Law of the District of Columbia and various sections of the code hereinbefore referred to, and section 8 is no improvement upon said law. Nor does this section provide for an appeal from the confirmation of the supreme court of the District sitting as a district court of the United States.

Praying that this bill be unfavorably reported upon, I am,

Yours, very respectfully,

JOSEPH I. WELLER,
Chairman Subcommittee.

Senator BURKETT. Mr. Gauss, will you now address the committee?

Mr. GAUSS. Mr. McNamara is here as representing the Attorney General.

Senator BURKETT. We will, then, hear from Mr. McNamara.

REMARKS OF MR. STUART McNAMARA.

Mr. Chairman and gentlemen, I have been asked to come here this morning simply to lay before the subcommittee such information as might be desired by them on the hearing of this bill. We have here Mr. Gauss, the secretary of the commission recently organized to investigate titles to public lands in this district.

Senator BURKETT. Mr. McNamara, will you put into the record, briefly, what this commission is, what it was authorized to do, and how it was created, so that we will have that information?

Mr. McNAMARA. Mr. Gauss, will you give that information to the committee?

Mr. GAUSS. Yes; the commission was established by the public-buildings act of 1908 and was directed to investigate the title of the United States to all lands in the District of Columbia, to file a map of the same, and to make recommendations to the Congress of action which should be taken in order to preserve the interests of the United States in any lands where an outstanding interest might be found, on investigation, to exist.

Senator BURKETT. Do you know the names of the members of the commission and how they were appointed?

Mr. GAUSS. The commission is composed of the Attorney General, chairman, the Secretary of War, the chairman of the Committee on Public Buildings and Grounds of the Senate, the chairman of the Committee on Public Buildings and Grounds of the House of Representatives, and the president of the Board of Commissioners of the District of Columbia—that is, the Attorney General, Mr. Wickersham, Secretary Dickinson, Senator Scott, Representative Bartholdt, and Mr. Rudolph.

Senator BURKETT. The commission has acted and has reported, has it?

Mr. GAUSS. It has made a partial report, but it has not made a final report.

Senator BURKETT. Is this bill in conformity with that part of the report?

Mr. GAUSS. Yes.

Mr. McNAMARA. I think that report ought also to go into the record. I think it will be very helpful to the Members who may not have seen it.

Senator BURKETT. Have you the report with you? How large a report is it?

Mr. GAUSS. Yes; there are two reports in printed form. They are public documents.

Senator BURKETT. How large a report is it?

Mr. McNAMARA. It is about 80 pages. They might be appended and used as exhibits.

Senator BURKETT. Very well, we will, then, have them put into the record. Give the numbers to the reporter.

Mr. McNAMARA. One is Public Document No. 653, Sixtieth Congress, second session; and the other is No. 632, Sixty-first Congress, second session.

Mr. GALLINGER. Is that one of those reports made by Mr. Sinclair?

Mr. McNAMARA. No.

Senator CARTER. It is the report made by the commission just mentioned of which Mr. Wickersham is the chairman. It covers in a general way the particular questions which were raised by this bill.

Mr. McNAMARA. The situation which this bill is proposed to meet is about this: When the city of Washington was laid out, as you probably know, the original proprietors met and conveyed their lands in trust to certain trustees. Out of the land thus conveyed there was carved out the streets and the avenues and the public reservations. The commissioners then allotted the land in equal divisions, one-half to the original proprietors and the other half to the United States. When they came to the division of lands near the watercourses in

the District of Columbia, the Potomac River and the Anacostia River, there were material omissions to exactly demarcate what was assigned to the original proprietors.

Under the act of cession of the State of Maryland sovereignty passed from the State of Maryland to the United States, including dominion over and ownership of all rivers within the limits of the cession and the soil underlying such rivers. Some years ago, in the Morris case, or as it is more generally known, the Flats case, litigation was had to determine the rights to the soil underlying the Potomac River and the riparian rights connected with its shores along a large portion of the Potomac River front of the city of Washington. The people who had property abutting the Potomac River claimed those rights. They had erected wharves on the river side. The Supreme Court of the United States held that the United States had the absolute title to the land abutting on and that it had the dominion over all of those properties; that there were no riparian rights in private persons along the river front unless they had been granted to them by Congress. So an equitable adjustment was made in these cases between the United States and the proprietors for the improvements placed on lands of the United States. The scope of this case was limited. It did not cover the entire stretch of the Potomac River, and especially did not cover the water front of the Anacostia River in the southeastern section of the city. There is a very considerable amount of land in which the United States has and always has had very valuable rights, but which is and has been occupied by private citizens. They have got on the land simply by the failure of governmental user of these strips. Through misunderstanding the District of Columbia has assessed certain of this land for taxes, and sales for taxes have been made. Of course I need not say that an assessment against land of the United States is a nugatory thing.

Senator CARTER. That proceeded by the employment of certain fraudulent devices in the beginning—one person giving a deed to another?

Mr. MCNAMARA. Yes, sir.

Senator CARTER. And then the grantee failing on the taxes, the land was sold?

Mr. MCNAMARA. The land was sold.

Senator CARTER. Such a title was false and fraudulent?

Mr. MCNAMARA. Yes; it is analogous to the old method of the casual ejector in the common-law proceedings. There were many of these casual ejectments in this city and many of these tax titles thus created. When these entrymen failed to pay their taxes the District of Columbia offered the land at auction and the gentlemen who were speculating in those properties would go in and acquire, and then holding for some years would put up a fence, and gradually would assume all the appearances of real owners. The United States now wishes to determine its rights to this land.

There is another subdivision of property, which would consist of squares and lots not immediately abutting on the river, where there was a failure to make a division between the United States and the original proprietor. It was contemplated by the original deed of trust to allot lot A, we will say, to the original proprietors and lot B to the United States. In some cases they failed to make a proper

registration of the certificate of allotment. It is not the purpose of the United States to roam forth and seek whom it might devour in these matters, but simply to perfect the division where there has been a failure to divide or to record the division and to clear the title to the building property in the city.

Senator DILLINGHAM. That has been done by two or three bills recently introduced, has it not?

Mr. MCNAMARA. Yes. The exact purpose of this bill is to secure a proper method of trying out the questions which have arisen as a result of the investigations of the commission. If the United States proceeds as an ordinary litigant in an action of ejectment, it must submit to having a jury called, with all the incidents of a mere legal case between private parties, and under such circumstances the United States is at an immeasurable disadvantage.

Senator BURKETT. Is this different from the law that was enacted to quiet the title to the Potomac Flats?

Mr. MCNAMARA. It is exactly the same.

Senator BURKETT. Have you tried these titles in some instances by means of ejectment proceedings?

Mr. MCNAMARA. Yes, sir; we have; just a little while ago.

Senator BURKETT. How did it work?

Mr. MCNAMARA. It worked very well for the defendants. An action was instituted in this city to recover what is known as Fox's Discovery. About 60 or 70 years ago there was a tract of land which belonged to the United States as a result of the convergence of two or three streets at what is now the corner of Fifteenth Street, Sixteenth Street, Florida Avenue, and New Hampshire Avenue, just east of where Senator Henderson's house is.

The Government was very anxious to have that section there for the purpose of a park improvement, and as it had this claim it brought suit in ejectment to recover the property. The trial court allowed every bit of evidence the United States offered. The Government had the proof, which, in my judgment, amounted to a demonstration. They had the maps showing that this particular piece of land was formerly a public highway and was the particular street mentioned by the makers of the early maps as the street bounding the city. But the street having been hilly and rather marshy in places the course of traffic took a southerly route, made a detour, and after some time the old road was abandoned, whereupon the owner of the property moved his fences down and included that triangle in the next deed that he made. The defendant had no case to offer against that except to attack, as of course is perfectly proper, any weakness in the Government's case. It took the Government and the defendant eight days to try that case. The instructions of the court were confirmatory of the Government's case and very favorable to all of its contentions, and specifically instructed the jury not to apply the statute of limitations to the claim of the Government nor to consider that any possessory right, which would apply in the case of private litigants, could apply to the United States. The jury took less than three-quarters of an hour to consider the testimony given in eight days and came in with a verdict for the defendants, thus confirming their ownership to the deprivation of the United States.

If the Government is obliged to try these other actions in that way, it is only reasonable to assume that they will have similar results.

Nor in the procedure proposed by this bill, I may suggest, will the Government be taking any unusual course. At common law it was the practice of the sovereign not to sue in ejectment, but in equity for the removal of a purpresture because the Government, in the eyes of the law, always is in possession of its land. That was the idea which actuated the passage of the flats act in 1886, and it is the idea which actuates this proposed act. The Government desires to proceed in equity, to cite in all the people who may have any claim or share in a claim in this property for a proper judicial hearing, and after a hearing to have a decree deciding whether the right of the United States does exist as indicated by the facts upon which the proceedings may be founded.

Senator BURKETT. Then, under this bill, that decree comes to Congress for further action?

Mr. MCNAMARA. It will be reported to Congress.

Senator BURKETT. As I look through the bill hastily, one of the questions is, what will be its practical operation? Suppose the court finds that there is due to one of these claimants a certain amount of money in equity, $500 or $1,000. There is no provision in the bill, as I read it through, for the payment of that, or for the awarding of a judgment, or for anything further than just the finding and report to Congress. I say I have not read it through completely.

Senator CARTER. The decree of the court would be conclusive on the rights of the parties, would it not? Of course, Congress would have to take action on it to provide for and appropriate money for the payment of such decree.

Mr. MCNAMARA. To provide for such damages as might be awarded for the value of improvements.

Senator CARTER. But your action here is merely an action to quiet title?

Mr. MCNAMARA. Yes.

Senator CARTER. And the United States will be found to either own or not to own a given piece of land. How does Congress have anything to do with that? The decree of the court would be executed by the court, would it not?

Mr. MCNAMARA. Except that there might be in a certain case a claim for betterments which in equity and good conscience the court might allow.

Senator BURKETT. There were cases, under the other law, and I understand this proposed law is a copy of that law. How did that law work in practice? What was done when the court decided these questions of equity? How did private parties get their money if the court found in their favor?

Mr. MCNAMARA. The court sent the case back to have testimony taken as to the value of the improvements. The jury then found the value of the improvements and made an award in favor of the particular property owners. I think then there was an appropriation to pay those awards. I will ask Mr. Strickland about that.

Senator CARTER. In this case, under the bill, the court of equity would ascertain the value of the betterments?

Mr. MCNAMARA. Yes, sir.

Senator CARTER. The court would have a jury to say what was the value, if it deemed it wise so to do? That would be optional with the court?

Mr. McNAMARA. Yes, sir.

Senator CARTER. And the finding of the court as to the value of the betterments made in good faith would be certified to Congress?

Mr. McNAMARA. Yes, sir.

Senator CARTER. For such action as Congress might think proper to take?

Mr. McNAMARA. Yes, sir; that is quite correct.

Senator BURKETT. On the first page of the bill, in line 9, it reads:

Within the limits of the city of Washington, or exterior to said limits.

Is that also in the original act? That is, does it authorize you to inquire as to lands "in the District of Columbia within the limits of the city of Washington, or exterior to said limits," or does it confine you to lands within the city of Washington?

Mr. McNAMARA. Of course we are confined to the District of Columbia.

Senator BURKETT. In this same section, on the next page, it reads:

As well as the beds of said rivers or branch and the uplands adjacent thereto.

You will notice that in line 2.

Mr. McNAMARA. Yes, sir.

Senator BURKETT. Was that in the other act also?

Mr. McNAMARA. Yes; that was all in the flats act.

Senator BURKETT. What is the necessity, in order to reclaim the Potomac flats, of going after the uplands in that section?

Mr. McNAMARA. This is the purpose. The line where the water stops and uplands begin is a sort of movable one, by reason of the filling-in which is always going on along a water front. The United States also acquired interests in the upland as it existed in 1791 as a purchaser in addition to its sovereign rights.

Senator BURKETT. I would like to understand just how the United States would have any claim to any of the uplands. They may have title to the flats, and that should be determined, but why you should put in uplands there is what I do not clearly understand.

Is there anything further you wish to say, Mr. McNamara?

Mr. McNAMARA. I should like, if the committee find it agreeable, to ask Mr. Gauss to make a few statements with respect to this bill.

Senator BURKETT. I take it there are some people here who want to be heard against this bill; are there not? Are there some present who desire to be heard against this bill? We shall have to close this hearing at 12 o'clock, and we want to divide the time so as to allow those who are against the bill to have some time to speak.

Senator DILLINGHAM. If I may be permitted, I think the last speaker was cut off when he was making an inquiry of some one sitting directly back of him as to the payment for betterments made under the former act.

Mr. McNAMARA. Yes; I inquired of Mr. Strickland, and he confirmed what I said, that the findings of the court were certified to Congress and an appropriation was made on such a report for the payment of the awards.

Senator BURKETT. I understood that.

Senator DILLINGHAM. Yes; but he had not stated it.

STATEMENT OF MR. H. C. GAUSS.

Senator BURKETT. Mr. Gauss, do you wish to be heard on this bill?

Mr. GAUSS. If there are any questions Mr. McNamara desires to ask, as he is in charge, I will answer them.

Mr. MCNAMARA. I do not know if that order will suit you gentlemen of the committee. I might bring to the committee's attention a few questions I should like to have appear in the record.

Senator BURKETT. You may proceed. We will be very glad to have anything that will contribute to a complete understanding of the bill.

Mr. MCNAMARA. Mr. Gauss, what is the purpose of the language of section 1 of the act, in lines 9, 10, and 11, reading:

within the limits of the city of Washington, or exterior to said limits, composing any part of the Anacostia River, etc.?

Mr. GAUSS. That is so that the right of the United States may be ascertained not only in the part of the Anacostia River immediately within the city of Washington, but in all parts throughout the length of the river where it is proposed to make the improvements. The main questions, of course, lie within the limits of the original city of Washington, but at a later date it may be, and probably will be, very desirable to have the power to settle any questions which may arise in the location of the improvements just outside of the city. The original city limits ended a short distance north of the reservation that is occupied by the jail, and the proposed improvements, as I understand, go considerably above that, so that questions may arise outside of the original limits of the city which it will be desirable to have settled. But the main purpose of that section is to settle the very difficult questions which may arise along the Anacostia River within the limits of the city of Washington.

Mr. MCNAMARA. With respect to the lands which may be affected by the scope of this act, I will ask you if there is any land except the land along the Anacostia River as to which the United States has any claims?

Mr. GAUSS. There is another piece of land of considerable extent which runs from the point that was the northwestern limit of the land affected by the Potomac Flats case and continues north as far as K Street. This land lies on the bank of the Potomac River and on Rock Creek, west of Twenty-seventh and Twenty-eighth Streets. There is a great deal of land that has been filled in there. There is some land that was west of the binding street of the city which the commissioners apparently had no right to convey, and there is also a large reservation called 94-A, in regard to which there is already a suit in ejectment filed. In view of our experience with ejectment cases it seems very much more to the interest of the United States to proceed in equity. It is prospectively very valuable land to the United States, because it would be needed for the connection of Potomac Park with Rock Creek Park.

Senator CARTER. Will you permit me to inquire the purpose in inserting this limitation, to wit, line 9:

Within the limits of the city of Washington.

Why not strike those words out, and allow the act to apply to the District of Columbia at large?

Mr. GAUSS. It is for this reason: That Mr. Strickland, who drew the bill, followed the language of the Potomac Flats bill very closely, feeling that that was a good precedent. It had been tested thoroughly through the Supreme Court, and he considered it would be better to follow the language of that bill so long as it was entirely applicable, rather than to make any change of verbiage which might raise a question. This language simply makes a definite statement of jurisdiction in regard to the limits.

Senator CARTER. Very well, but do you discern any difference in principle, in the application or extension of jurisdiction over the District of Columbia and a particular part of it?

Mr. GAUSS. I do not think there is any reason for it except the practical reason that it was used and supported in the Potomac Flats bill.

Senator CARTER. That is a limited reason, of course.

Mr. GAUSS. There is this distinction, that the status of the titles in the city of Washington and the status of the titles outside of the city of Washington is altogether different. That is, the United States took in the city of Washington as a purchaser. Outside of the city of Washington it has simply its sovereign rights, but in the city of Washington it has in addition to its sovereign rights the rights of a purchaser.

Senator CARTER. Can you perceive how the granting of jurisdiction to ascertain those sovereign rights outside of the original limits of the city would in any way militate against the interest of the United States in prosecuting a suit to maintain its rights within the city?

Mr. GAUSS. I do not see any reason other than that which I have given.

Senator CARTER. It appears to me at a casual glance that unless there is some special reason other than the fact that a former bill contains certain verbiage that the broader jurisdiction would be the simpler jurisdiction.

Senator GAMBLE. It seems to me that it is an unsual verbiage used here. You see, the first proposition is within the District of Columbia. Then it is limited in its provisions to the city of Washington, then you put in "or exterior to said limits," and thus you get back to your first proposition.

Mr. GAUSS. Yes.

Senator GAMBLE. It looks as though the bill possibly in being considered was amended. I do not believe it was ever drawn that way in the original draft.

Senator BURKETT. The definition of jurisdiction does not change the original meaning. I called attention to this language and asked if there was any particular purpose in it. The principal clause says "the District of Columbia." It seemed to me it was that that we were concerned in.

Mr. MCNAMARA. I think Senator Carter's suggestion is the simplest way of defining jurisdiction. It was doubtless written into the draft of this bill simply because it appeared in the other bill.

Senator BURKETT. The other bill was made that way because the portion of the Potomac River affected was first fixed in Washington,

and then somebody wanted it outside of Washington and made that amendment. That is the way it was probably made.

Senator CARTER. Or perchance some one outside of the limits of the city of Washington did not desire that the Government should make any inquiry into its right.

Senator BURKETT. Is that all? I desire to give the other side an opportunity for 20 minutes to present its side of the question, as we desire to have this matter finished.

Mr. MCNAMARA. I think that is all.

Senator BURKETT. Who is present who desires to be heard on this *bill*? Mr. Weller does not seem to be present. He has written a letter stating he wanted to be heard against the bill, and we have his letter here.

Is there anyone else who desires to be heard against this bill?

STATEMENT OF MR. W. H. ARNOLD.

Mr. ARNOLD. Mr. Chairman, I think the notice is rather short. I saw it for the first time in yesterday evening's Washington Star.

Senator BURKETT. The time is very short between now and the end of the session, and we will have to take the bill in soon if we are going to take it in at all. Do you desire to be heard against it?

Mr. ARNOLD. No; but I should like to have an attorney, representing me, speak against it. We have not had the time to engage attorneys. I received the first notice yesterday afternoon through the Star.

Senator BURKETT. Is there anyone here to-day who desires to speak against the bill? Mr. Arnold, could not your objections be put into a brief by your attorney and filed with us within a day or two. It would be very difficult for us to have another meeting.

Mr. ARNOLD. Would not that be putting our side at a disadvantage?

Senator BURKETT. Your attorney can submit, in writing, your objections to it, and that will get it into the record just as well as if made orally.

Mr. ARNOLD. Yes; but have not the attorneys for the United States submitted both verbally and otherwise their objections?

Senator BURKETT. Yes.

Mr. ARNOLD. Would it be quite fair, then, to the other side?

Senator BURKETT. Certainly, because they are here and ready and submitted what they wanted to say. Now, we are desirous of hearing from the objectors.

Senator SCOTT. If you submit a brief it will go into the record the same as if the argument were made here verbally.

Mr. ARNOLD. I do not propose to make it myself, but to file it through an attorney. I am not prepared to say anything.

Senator GAMBLE. How soon could you retain an attorney, and have him prepare an argument, and submit it?

Mr. ARNOLD. I could obtain an attorney almost immediately, but whether he could, in the limited time, submit a brief, I do not know. Gentlemen who are attorneys can best speak as to that from their own experience.

Senator BURKETT. You see, this bill has been pending quite a while, and we supposed that all of the persons interested would be ready.

Mr. ARNOLD. I may state that I own a piece of land next to the Anacostia River Bridge on the Eastern Branch, which has been improved, and on which for half a century we have been paying taxes in good faith. I have just returned from abroad, and it is an absolute impossibility for me, knowing nothing of this bill, to speak now. I should like to have an opportunity of engaging an attorney and allowing him to put in an argument for me.

Senator BURKETT. Can you get the argument in by Monday or Tuesday?

Mr. ARNOLD. I shall urge my attorney to do that. I think he could, but I can not say that positively. Not being an attorney myself I have no idea as to the time it would take him to prepare such an argument.

Senator BURKETT. Suppose we allow you until Tuesday noon to file your brief.

Mr. ARNOLD. Yes.

Senator BURKETT. Or any of those who may have objections to file.

Mr. ARNOLD. May we have the advantage of making a verbal statement, such as the United States attorneys have had?

Senator BURNETT. The trouble is that very possibly we can not get all of the committee together. Almost all of us left other committees to come here this morning. It is difficult to get a committee meeting now.

Mr. ARNOLD. I appreciate that fact, but we have——

Senator BURKETT. We will give a hearing Monday morning at 10 o'clock to those of you who wish to be heard further.

Mr. ARNOLD. Thank you.

Senator SCOTT. Will it be a hearing before the subcommittee?

Senator BURKETT. The subcommittee will be here. Mr. McNamara, have you anything more to say this morning?

Mr. MCNAMARA. If the committee please, we should like to have the privilege of filing a memorandum in reply to the arguments of Mr. Weller, if we may have an opportunity to inspect his letter. That would tend to simplify matters.

Senator BURKETT. That can be done by Monday?

Mr. MCNAMARA. By Monday, if we have an opportunity to see the letter.

Senator BURKETT. Then, of course, all arguments, written and oral, must be completed here at the hearing Monday.

Mr. MCNAMARA. Yes.

Senator BURKETT. The time which I allowed until Tuesday to file briefs then will be withdrawn. As I suggested, all further arguments must be submitted at the meeting to be held at 10 o'clock Monday.

Mr. ARNOLD. I am not in a position to accept that limitation.

Senator BURKETT. Well, we will make that limitation.

(Thereupon the subcommittee adjourned to meet on Monday, February 13, 1911, at 10 o'clock a. m.)

WASHINGTON, D. C., *February 13, 1911.*

The subcommittee met at 10 o'clock a. m.

Senator BURKETT. I am sorry that all of the committee are not present this morning, but as I explained last week, when we take a day out of order like this for a special hearing some of the members who are on other committees, on the regular meeting days of those committees, necessarily have to go there. This hearing, of course, is being reported, so that whatever is said here will go into the record and be available for the other members of the committee before any action is taken.

Before we proceed further, Mr. Gauss, I have had my attention called by a communication to page 2, line 11, of the proposed measure, down to and ending in line 15.

Mr. GAUSS. You refer to where it reads:

In all lands which have not been fairly and equitably divided.

Senator BURKETT. This communication comes from W. E. Edmonston, president of the Real Estate Title & Insurance Co. and the Columbia Title Insurance Co., and he suggests that the bill should be amended by striking out the words "fairly and equitably divided;" so that the section shall provide that all suits mentioned in that section should apply only to land which had heretofore not been divided between the public and the original proprietors of the land on which the city of Washington was located.

Mr. GAUSS. I may say that the words "fairly and equitably" were used there because they were used in the original deed of trust; but I do not see any special point in these three words. I see no objection to amending the bill, leaving out the words "fairly and equitably."

There are only a few pieces of land that have not been divided.

Senator BURKETT. The change is simply to cut out that description. This letter also suggests that in section 3, after the word "notice," express provision should be made for the actual notice of any proceedings to be given to the parties in possession, where there is an actual possession; such notice to be given to the owner, if in possession, or to the tenant or occupant.

Mr. GAUSS. In what line do they propose to make that amendment?

Senator BURKETT. It refers to section 3.

Mr. GAUSS. I think that if Mr. Edmonston would submit a definite amendment to that section we would be glad to consider it.

Senator BURKETT. Mr. Edmonston is here.

Mr. EDMONSTON. I have penciled an amendment.

Senator BURKETT. Mr. Edmonston, what do you suggest as an amendment so as to have this matter correct?

Mr. EDMONSTON. In section 3, on page 3, in line 9 after the word "court" I would suggest that you insert:

And in case the land is in actual possession of such claimants or their tenants, such notice shall be served upon such claimants or their tenant in possession.

That would give the necessary notice.

Mr. GAUSS. We generally agree with Mr. Edmonston on his main point. Suppose we consult Mr. Edmonston, frame an amendment, and then subsequently submit it.

Senator BURKETT. It seems to me, Mr. Edmonston, if I may be permitted to suggest it, that you do not go quite far enough. You have to join that up also with the other provision, as to the cases in which you can not get personal service.

Mr. EDMONSTON. Oh, yes; that would come as a matter of course.

Senator BURKETT. I suppose you ought to have constructive service on a man who has the fee if you can not get personal service upon him, even if you had actual personal service on the tenant.

Mr. EDMONSTON. I do not want to have that left open.

Senator BURKETT. Mr. Gauss suggests that there is no controversy in regard to it.

Mr. EDMONSTON. I only suggested it.

Mr. GAUSS. I think there is no objection.

Mr. EDMONSTON. It is just simply to get notice to the parties who are actually interested.

Senator BURKETT. Then will you confer with Mr. Gauss and Mr. Strickland, prepare an amendment, and submit it to me.

Have you anything further to say, Mr. Gauss, before we begin with the other parties?

Mr. GAUSS. I simply wish to submit some comments on Mr. Weller's letter, as we were authorized to do at the last meeting. I have the paper here.

Senator BURKETT. What do you wish in regard to it?

Mr. GAUSS. I ask that it go into the record.

Senator BURKETT. By whom is this communication made?

Mr. GAUSS. It is made by Mr. McNamara and Mr. Strickland, as counsel representing the United States, and myself as secretary of the commission.

Senator BURKETT. The communication handed in by Mr. Gauss will be inserted in the record.

(The letter referred to is as follows:)

DEPARTMENT OF JUSTICE,
Washington, D. C., February 11, 1911.

Hon. ELMER J. BURKETT,
Chairman Subcommittee on Senate bill No. 10136,
United States Senate, Washington, D. C.

SIR: We have the honor to submit the following comments on the letter of Mr. Joseph I. Weller, chairman of a subcommittee of the committee on legislation of the Washington Chamber of Commerce. It is pertinent to state that Mr. Weller, although appearing as the chairman of a subcommittee of an association of citizens, is, in fact, the attorney for persons claiming interests in the lands affected by Senate bill No. 10136, which interests are wholly adverse to the rights of the United States.

Mr. Weller has appeared as the representative of certain persons making claims adverse to the title of the United States to the property upon which it is proposed to construct the switch to the navy yard. All of the land to be occupied by the spur track and a large part of the land desired for yardage appears to be property of the United States, although encumbered by certain adverse claims, most of which are represented by Mr. Weller, and it is intended to clear the title of the United States to this land under the terms of the proposed bill.

Mr. Weller also represents Mr. Thomas W. Smith, who seeks to secure possession of the so-called Square 803, carried in the assessment of the District of Columbia as property of the United States. This square has been leased by the wharfing commission of the municipal government of the District of Columbia to private parties and Mr. Weller is one of the attorneys in a landlord and tenant proceeding by which the lessee of the District of Columbia is sought to be dispossessed.

It is also understood that persons represented by Mr. Weller have other claims along the Anacostia River front which are wholly adverse to the appar-

ent rights of the United States, and if Mr. Weller's contentions in behalf of these various claimants are sustained, it will be necessary in order to acquire the land for the navy-yard track and the proposed improvement of the Anacostia River to pay Mr. Weller's clients very large sums of money. It is, therefore, submitted that Mr. Weller's letter should not be regarded as the expression of the views of a body of citizens, but simply as representing his own views as an attorney promoting interests adverse to the interests of the United States.

Mr. Weller's general objection that satisfactory procedure for the condemnation of land in the District of Columbia by the United States is now provided by the Code and that new procedure is not necessary is not material with respect to the first seven sections of S. 10136, since it is not proposed to condemn land, but simply to clear title. Condemnation proceedings would be entirely inappropriate, since, under such proceedings, the United States would be placed in a position of seeking to condemn land which it already owns.

Mr. Weller's criticism of section 1 is met by the statement before the committee as to the undesirability, from the point of view of the interests of the United States, of proceeding in ejectment. It is only by a voluntary abandonment of its sovereign capacity that the United States submits itself to such proceedings, and, as the rights of the sovereign constitutes one of the fundamental considerations in connection with the titles affected, the United States would be abandoning a substantial portion of its rights if if it should consent in these cases to proceed as Mr. Weller suggests.

There is no purpose or possibility of a general unsettling of titles by section 2, as suggested by Mr. Weller. On the contrary, the purpose of the bill is and its effect will be to determine unsettled questions of title in the city of Washington which now exist. No question affecting titles will be raised under this bill which is not well known at the present time to title examiners. The cure of defects in title which is sought to be effected is largely for the benefit of the present holders of the land. These defects are well understood to be in existence and have been ignored by title examiners because of the impression that the United States having allowed the matters to lie dormant for many years would continue to do so.

The Congress having required a report upon its titles in the District of Columbia, the commission charged with making this report has no alternative but to point out the defects which exist and the outstanding interests of the United States, and such report, if made before these various questions are determined, would, it is obvious, have far more effect in unsettling the basis of real-estate titles and making transactions in real estate uncertain than a bona fide attempt, such as is proposed under this bill, to establish once and for all a permanent basis for real-estate titles in the city of Washington.

The United States has not at the present time a remedy appropriate to the circumstances of these cases, and these defects must remain uncured for an indefinite period, unless by procedure such as now proposed a speedy means of settlement is authorized by Congress by which at a minimum expense both to the United States and to the owners of private interests, these questions, which are largely technical, can be judicially considered.

Mr. Weller's objections to sections 4 and 5 are answered by the statement that these sections are identical with corresponding sections in the act of Congress of August 5, 1886 (24 Stat. L., 335), which authorized the proceedings in the so-called Potomac Flats case.

Section 6 is intended to place the rights of the United States on the same footing as those of the owners of private interests and to give the United States equal consideration in the matter of determining the value of its outstanding rights, except that special consideration is given present occupants of lands who have purchased for value and in good faith, by giving the court a broad scope of discretion as to its findings. It may base its decrees not merely upon the present value of the land but upon all the considerations relating to all the transactions in the property so that the United States may be adjudged simply such a value as it ought to expect in equity and good conscience. The language of this section is expressly drawn to give the court latitude to take the equities of private persons into consideration to a degree which would not otherwise be possible.

Section 7 is identical with the language of the Potomac Flats bill and is calculated to secure a speedy final decision of a test case which would be a precedent in other cases and thus expedite the whole matter to an early conclusion.

Mr. Weller's objection to section 8 of the bill apparently results from an imperfect apprehension of the facts and a failure to understand the object of

the section. The title to much of the property acquired by the Government in the District of Columbia is taken under the act of Congress approved August 30, 1890 (26 Stat. L., 413). The Government does not often avail itself of the provisions of chapter 15 of the Code of Laws of the District of Columbia. The object of section 8 is to shorten the method of condemning land and to avoid unnecessary expense, and in these respects it is a decided improvement over the present law, while it preserves, in every particular, the principles of the condemnation proceedings now authorized.

SUPPLEMENTARY DOCUMENTS.

As indicative of the character of the rights of the United States proposed to be asserted under the pending bill, there is submitted a synopsis of the report made by Hugh T. Taggart, Esq., to the Commissioners of the District of Columbia relative to the titles on the Anacostia River within the city of Washington. There is submitted a definite statement of the lands which will be affected by this bill and a copy of a letter from Col. Spencer Cosby, United States Army officer in charge of public buildings and grounds. The latter officer now exercises, under the direction of the Chief of Engineers of the United States Army, the functions exercised successively by the original commissioners of the city of Washington, the superintendent of the city, and the commissioner of public buildings. The office of public buildings and grounds has the custody of the original records of the city of Washington, and the action proposed under this bill is intended to place in the custody of that office and of the District Commissioners, as required by law, lands properly belonging to the United States, and to correct the records of the office of public buildings and grounds so as to show beyond question the divestment of the title to public lots in the original city of Washington when such divestment is found to be the fact. When the work proposed under this bill is completed, the Commission to Investigate the Title of the United States to Lands in the District of Columbia will be able to complete the work directed by the Congress, which work must be suspended in some of its details pending the judicial settlement of the questions raised by its investigations.

STUART MCNAMARA,
Special Assistant to the Attorney General.
REEVES T. STRICKLAND,
Attorney in Charge of Titles.
H. C. GAUSS,
Secretary to the Commission to Investigate the Title of the United States to Lands in the District of Columbia.

REPORT OF THE SPECIAL COUNSEL ON PUBLIC AND PRIVATE RIGHTS ALONG THE FRONTAGE OF THE CITY OF WASHINGTON ON THE ANACOSTIA RIVER.

Synopsis.

By the cession from Maryland of territory for the permanent seat of the Government of the United States title to and dominion over the shores, bed, and waters of the river were vested in the United States, as incident to its powers of government, as the sovereign, and held in trust for the public. Wharves or other obstructions could not be lawfully erected in the space without the authority of Congress.

The title of the riparian owner ended at the line of high water, where that of the United States began. The only rights to which the riparian owner was exclusively entitled by virtue of his situation were (1) the right of access to the water from his land and to his land from the water, a right which the United States were not bound to preserve for his benefit and which it might destroy in the interest of the public; and (2) the right to accretions to his land—that is, additions, gradually and imperceptibly made to it. Beyond the line of high water, and on the shore adjacent to his land and in the stream, the riparian owner had the same rights only as other members of the public.

The acts of Congress of 1790 and 1791 accepting the cession by Maryland did not, in terms, authorize the laying out of the city of Washington. The commissioners, provision for whose appointment was made, were charged with the duty of defining and limiting the Federal district, under the direction of

the President, and were authorized to acquire, by purchase or gift, such quantity of land as the President might deem proper "for the use of the United States," and to erect buildings for the accommodation of Congress, the President, and public offices of the Government.

Provision for laying out the city upon lands held in private ownership was made by deeds of conveyance of such lands by the owners in trust for that purpose. The city of Washington had its origin in these deeds. Under the trusts declared in them the President was empowered to formulate the plan of a "Federal city," and it was provided that title to the streets of the city should be vested in the United States in fee simple.

The plan adopted by the President brought the city to the water's edge, and exhibited a street along the margin of the river, as the owner of which, if it had been laid out on the lands conveyed as contemplated by the deeds and by the plan, the United States would have become the riparian owner.

In carrying the plan into effect, on the ground, the authority of the commissioners was confined to the upland. They were invested with no authority to lay out streets and squares in the Anacostia River.

The acts of Congress of 1790 and 1791 gave them no power to appropriate lands, the title to which was in the United States, and the deeds in trust did not and could not confer such power upon them.

The State of Maryland, after the cession, had no power or jurisdiction to appropriate or provide for the appropriation of the soil of the river for wharfing or other purposes. Congress only could exercise that power. So much of the Maryland act of 1791 as gave the commissioners authority to license the building of wharves in the waters of the Potomac and Anacostia Rivers was therefore ultra vires, and the wharfing regulations issued by the commissioners and based upon it were void.

The commissioners disregarded the plan adopted by the President and its principles in laying out the city along the shore of the Anacostia River. The city as it should have been laid out along the river is shown on Exhibit No. 1, being a section of the plan adopted by the President; and the city as it was actually laid out along the river by the commissioners is shown on Exhibit No. 2, being a section of a plan based on returns of surveys prepared in 1797 in the commissioners' office.

The commissioners did not lay out the street along the margin of the river as called for by the plan, thus depriving the United States, so far as it was in their power to do so, of the riparian ownership which it was intended by the plan that it should possess.

They laid out squares, bounded on all sides by streets, partly on the upland bordering on the river and partly on land under the waters of the river, which belonged to the United States.

They laid out squares, bounded on all sides by streets, and wholly on land under said waters, which belonged to the United States.

They laid out squares, with boundaries on the sides, which projected indefinitely into the waters of the river and apparently intended to extend to the navigable channel.

And, although title to such submerged land was absolute in the United States, they subjected it to the provision of the deeds for "a fair and equal division" between themselves and the original proprietors of the upland. This is illustrated by Exhibits Nos. 3 to 10, inclusive.

They permitted and authorized the erection of wharves and buildings in the waters of the river.

These acts were done without authority from Congress, and they afford no valid foundation for claims of title to the submerged land by private persons as against the United States.

The commissioners were arbitrary and inconsistent in their rulings as to what constituted "water property," although without authority whatever in the matter. Lots situated in a particular manner with respect to the water were held to be entitled to the privilege of wharfing, while other lots similarly situated were held not to be so entitled.

The confusion and uncertainty as to rights and titles along the river front of the city on the Anacostia is due to the unauthorized acts of the commissioners.

The late corporation of the city of Washington was invested with certain powers over wharves by the first legislation of Congress on the subject. The power to license the erection of private wharves was not included in such powers, and the power was not granted to the District governments created by

the acts of 1871, 1874, or 1878, and it was not vested in the District Commissioners by the act of March 3, 1899.

From the beginning of the city, therefore, there has been no private wharf on the Anacostia River having the authority of an act of Congress for its erection and maintenance.

Plenary power over the matter of public wharves was granted to the city of Washington by Congress, and under the act of 1899 is now vested in the commissioners of the District.

LANDS AFFECTED BY S. 10136.

This bill is intended to afford a means of clearing title.

1. Along the Anacostia River, including land on the river side of Water Street and Georgia Avenue and filled-in lands along the river between Second Street east and Second Street west.

This includes the right of way for the navy yard switch, square 803 and south of 771, the made lands shown along the river; also the squares on Buzzards Point and squares 612 and 613.

2. To clear title to the land not included in the Potomac Flats west of Twenty-seventh and Twenty-eighth Streets, along the upper part of the Potomac River and Rock Creek. It is possible also that it may be found necessary to deal with small parcels of land immediately adjacent to the Potomac Park, and which may be needed to improve the lines of the said park. The land along the Potomac and Rock Creek includes the made land beginning west of square south of 12 and going northward to K Street, including the so-called square 3, west of 9, and reservation 94a.

3. To determine questions arising out of the fact that there is no record of the division of certain squares in the city of Washington between the original proprietors and the public. The land affected includes a portion of the land affected by the location of the navy yard switch, and also squares 825, 983, 1025, south of 1025, south of 1048, north of 1053, 1148, and 1149.

4. Land originally assigned to the United States in the division with the proprietors which had never been sold, but which is in the possession of private parties.

This includes lot 8, square 153; parts of lots 5 and 6, square 965; lot 9, square 996; lot 2, square 1041; lots 1, 2, and 20, square 1105; lots 2, 3, and 4, square 1113; square 1152.

5. Land as to which there is evidence that a contract of sale was made, but where the legal title is still in the United States, owing to a failure to record conveyances as required by law. This includes lot 4, square 57; lots 6, 9, and 10, square 74; lot 3, square 80; square 82; lots 2 and 5, square 86; lots 3 and 4, square 103; lots 28 and 29, square 126; lot 20, square 166; lots 8–11, square 200; lot 8, square 224; lots 1, 2, 3, 6, and 16, square 225; lot 20, square 253; lots 15, 19, and 20, square 254; lot 9, square 406; lots 6 and 7, square 433; lot 20, square 447; lot 6, square 456; lot 21, square 568; lot 2, square 578; lot 16, square 634; lots 6 and 9, square 728. This is 37 parcels with one square and about 50 other lots to be investigated where some outstanding interest, legal, or equitable, or both, may be determined to exist. This fact calls for a general method by which any interest of the United States can be protected without the risk involved in ejectment suits of having the principles of the statute of limitations or of the law relating to adverse possession unlawfully or erroneously applied by juries.

This also applies to any interest which may be found to exist in "vacant lands" in the District of Columbia outside the city of Washington.

OFFICE PUBLIC BUILDINGS AND GROUNDS,
Washington, February 9, 1911.

Mr. H. C. GAUSS,
Secretary Commission to Investigate the Title of the United States to Lands in the District of Columbia,
Washington, D. C.

MY DEAR MR. GAUSS: In accordance with your suggestion, I have just looked over Senate bill No. 10136, providing for the protection of the interests of the United States in lands and waters along the Anacostia and Potomac Rivers and

Rock Creek. The title of the bill, by the way, mentions only the Anacostia River and not the other two streams.

While my legal knowledge is too limited to enable me to give an opinion of any value upon the efficacy of the various legal steps provided in the bill, I do know that it is most important that prompt measures be taken to define and protect the property interests of the United States in the various lands mentioned in the act. This office has been trying in vain, for a number of years, to secure possession of land in the District of Columbia which it believes to be property of the Government, and it is sincerely hoped that Congress will provide a procedure by which such questions can be definitely settled.

Yours, very truly,

SPENCER CROSBY,
Colonel, United States Army.

Senator BURKETT. Is there anything further?

Mr. GAUSS. There is nothing further that I have to offer at the present time.

REMARKS OF MR. FULTON LEWIS.

Mr. LEWIS. I simply wish to say that this morning I was requestion by the chairman of the committee on municipal legislation of the Chamber of Commerce, who is interested in this matter, to come over in his absence and observe the proceedings. I understand that the document which has just been filed is an answer to the communication of the Chamber of Commerce. I should like an opportunity to examine it, or have a copy of it, in order that if there are any matters in it requiring further attention the committee may be able to give them such attention.

Senator BURKETT. Can you examine it here temporarily while we are going on with the hearing, with a view of answering it, perhaps, later on, or of saying what you wish to do in regard to it?

Mr. LEWIS. I will examine it as much as I can, but I fear I will not be able to understand it completely for such a short examination.

STATEMENT OF MR. FRED McKEE.

Mr. MCKEE. Mr. Chairman, in regard to this bill, I have filed a letter here, suggesting, without going into the merits of the case, that the United States had a special attorney, Mr. Hugh T. Taggart, who has investigated the question of riparian rights. I conceive it would be necessary to have some legislation similar, probably, to that in the Potomac Flats case. He has made a partial report, and his final report is about ready to be filed. I think it would be well to wait until he gets his report in, and see what he says as to the rights of the United States, before you take final action on this bill.

Mr. GAUSS. May I interrupt you just a minute? Mr. Taggart has made a final report, and a synopsis of his report is included in the paper I have just submitted.

Mr. MCKEE. I knew it was about ready to be filed. Mr. W. E. Edmonston, president of the Real Estate Title and Insurance Co., and one of the ablest title lawyers of the District, has gone into this bill and has some amendments and remarks he desires to make.

Mr. EDMONSTON. I have made the suggestions I desired to make.

Mr. MCKEE. But you have some other remarks to make, have you not?

Senator BURKETT. We would be very glad to hear from Mr. Edmonston. Mr. Edmonston, we would be very glad to have you stay here and make any suggestions you desire. I am very glad you are here. We have heard of you, and feel that you can be a very great help to us. If you will remain until we can hear these opponents to the bill then we shall be glad to have you close the hearing for us.

This gentleman and the lady who are present here this morning were here last week, and I may say we gave this meeting in part for their special benefit.

STATEMENT OF MR. W. H. ARNOLD.

Mr. ARNOLD. Mr. Chairman, I tried to bespeak counsel, but was told repeatedly that the time was too short; that if counsel appeared they would expect to present well-prepared and make learned arguments in the premises. But I asked my brother, who is a lawyer, to come here. He is here now and desires to make a few remarks in my behalf.

Senator BURKETT. We will be pleased to hear from your brother.

STATEMENT OF MR. EUGENE F. ARNOLD.

Mr. ARNOLD. Mr. Chairman and gentlemen, I would like to say by way of apology for not arriving earlier that I looked for the committee room in the new Senate Office Building, as I was misdirected. I have not had the pleasure of appearing in this committee room for a long time, and I was directed to go to the Office Building to find the committee, so I have lost the time since about 10 minutes to 10 looking for the proper committee room.

I do not know what has been said in respect to this measure, and I do not want to go over ground that may already have been traversed by somebody else. I see sitting here beside me Mr. Edmonston, who is probably much better prepared than I am to speak on this bill. He was practicing law in the District long before I was admitted to the bar, and he, certainly, by reason of his position here in the District of Columbia, is very deeply interested in the measure which you have under consideration now; because while the title of this bill is apparently limited, the scope of the bill is almost unlimited. I say it here, and I think it is self-evident to anybody who will read the bill, that there is not a title to land in the District of Columbia which would not be clouded and affected by the passage of this proposed measure. There is not one single inch of ground that I know of that is held by private interests in the city of Washington that would not be affected by this bill if it were passed.

To be brief, I might say the section that I refer to is that part of the second section which reads thus, in part:

SEC. 2. That when deemed warranted by the Attorney General of the United States, similar suits to those authorized by the preceding sections shall be commenced for the purpose of establishing and making clear the right of the United States in any lands in the District of Columbia or city of Washington, etc.

And then I go to line 11, reading:

In all lands which have not been fairly and equitably divided between the public and the original proprietors of the land on which the city of Washington was located—

That is in the discretion of the Attorney General, may it please the chairman—

In all lands which have not been fairly and equitably divided between the public and the original proprietors of the land on which the city of Washington was located, in accordance with the terms of the trust deeds entered into by said original proprietors.

Senator BURKETT. Mr. Arnold, just so that you will not need to discuss it unnecessarily, Mr. Gauss, who represents the Attorney General, has consented that the words "fairly and equitably" shall be stricken from the bill, at the suggestion of Mr. Edmonston.

Does that remove your objection also? That is, to the words "fairly and equitably" in line 12?

Mr. E. F. ARNOLD. It appears to me that this will improve this provision in the bill, but whether or not it will eliminate all objection to the same, I am not now prepared to say.

I will state that I had no intention or expectation of saying anything this morning in respect to this measure. I supposed there would be in attendance, here, gentlemen who are so much abler than myself, who have looked into this measure, and who would so completely cover all objections thereto, that it would be entirely out of place for me to add anything. Among others, Mr. A. S. Worthington, one of the leaders of our bar, told me, at a very late hour last night, that he would, if he could, be present this morning, but he had an engagement of such a character that he did not believe that he would be able to come, but that he would try his best to be here. He said if he could not come, he would telephone to the clerk of the chairman of the committee and say that he desired to be heard; and that he considered this an outrageous measure. I thought Mr. J. J. Darlington would be here also, and other distinguished gentlemen, so I did not expect to discuss the measure.

However, I repeat that while the proposed amendment will improve this section of the bill, I do not believe it will absolutely do away with all the injurious effects which would result from the enactment of this particular part of this section. It is important to remember that all titles in the District would be affected should the words "fairly and equitably" not be stricken out.

There is another objection, which is this: The measure proposes to do away with the common-law right which every citizen in possession of land has in this jurisdiction, to have his title, if it is called into question, determined by the common-law action of ejectment, in which all the presumptions are in favor of the one in possession. That remedy would be pro tanto abolished by this bill. One is thereby absolutely deprived of the right to an action of ejectment in such cases, and in lieu of it this special legislation is proposed.

This is a proposal to substitute a provision in the nature of a bill in equity—a novel proceeding in which the conditions are all changed, and the bill provides how this proceeding shall be carried on. It is carried on not only against those who may be known to be interested in the subject matter, but also against all who have any title, interest,

or claim in the premises, even if the owner of the land were without notice and absent in Kamchatka, or in Germany, as my brother happened to be, just recently, when another suit was instituted against him. The suit was pending for three years, and they got a decree pro confesso against him; that is, the preliminary decree, as you know, and subsequently to that there was a final decree, and yet he had no actual notice whatsoever of the pending suit.

Publication was substituted for personal service, although it was a proceeding in personam and not in rem, contrary to his common-law right, and contrary to his right under the Constitution of the United States, and he did not know anything of this suit until after he returned here. That suit had been going on for three years, and they had proceeded to final judgment before he returned. The same thing is not only possible, but is practicable, and very likely to occur in a case under this proposed enactment.

Under the provisions of this bill the rights of all the parties known or unknown to any land in question will be adjudicated and the whole matter determined, and they shall be, under the terms of this bill, forever estopped from calling in question the action of the special term of the court that sits upon this matter, and yet they may never have had a day in court under such ex parte proceeding or notice thereof.

To be brief, I think the bill is just loaded, just bristling, with such objections. I repeat that I have only had an opportunity to examine it in the most cursory and hasty way, and had no intention, in making that examination, of expressing myself in relation thereto before this committee. I had no desire or intention to be here this morning to speak upon the objectionable features of the bill, and my remarks therefore are to an extent rambling and entirely extemporaneous, and without deliberation. Any man who has ever had experience in speaking dislikes to be placed in a position of that kind. I am not prepared to talk on the bill as I should have been if I had studied it with a view of coming here and discussing it.

But it seems to me that section 8 of the bill proposes that which is in direct violation of the fifth amendment to the Constitution of the United States, which declares: "Nor shall private property be taken for public use without just compensation."

This section of the bill says—I read at the top of page 6:

SEC. 8. That whenever land in the District of Columbia, or easements or rights therein, are needed for the use of the United States for any purpose whatsoever.

Mark you, it does not say "for public use," but—

for any purpose whatsoever.

Then, in this special, novel, and summary way, the owner's rights are to be absolutely adjudicated, whether he is present and a participant in this suit or not, and whether he be known and a party to the cause or unknown.

It is objectionable, I say, under that provision, in two respects: The taking is not restricted to public use, under this section; it is taken for any use whatsoever. And then, also, the section offends against that fifth limitation upon the Constitution of the United States—that is, the fifth amendment of the Constitution as to the "just compensation" required.

I say that the payment of this money into the Treasury of the United States, as provided, is not the just compensation contemplated by the Constitution. The United States is the actor, the plaintiff. In this proceeding it would be, I suppose, the complainant, as it is a bill in the nature of a chancery suit. The United States is to pay the money into its own Treasury and to hold it and let the actual parties defendant fight it out in whatever way they may; and, then, by the action of the court, it is to be determined, whether or not the owners of the property in question are regularly before the court, who is entitled to this alleged just compensation. I think that such a proceeding will not satisfy the provision of the fifth amendment to the Constitution as to just compensation.

I will not go into any authorities here. In fact, I had not prepared myself, but on leaving my house this morning to come here I hastily grabbed from a book shelf "Paschal's Annotated Constitution," and on page 261 thereof the last section of this fifth amendment to the Constitution is spoken of in this wise:

Private property for public use without just compensation.—"Private property" is the sacred right of individual dominion. It is one of the great absolute rights of every citizen to have his property protected. And the Government has no right to deprive the citizen of his property, except for the use of the public; nor then, without compensation.

These are the words of Judge Story, the great commentator on the Constitution of the United States, in "Story on the Constitution," section 1790.

Senator BURKETT. Do I understand you that you are making a distinction between the words "for public use" and the words as found in lines 2 and 3—

for the use of the United States?

Mr. E. F. ARNOLD. Public use? What line is that, Senator?

Senator BURKETT. At the top of page 6, beginning in lines 2 and 3, reading—

needed for the use of the United States for any purpose whatever.

Mr. E. F. ARNOLD. "As are needed for the use of the United States for any purpose whatsoever"; yes, sir. I think that is not a limitation to public use.

This is all in the discretion of officers of the United States, and it is not very clear what officers of the United States are meant—who these officers might be.

The bill goes on to say that it is in the discretion of the officers of the United States that private property may be taken; and it might be, according to the discretion of these officers who undertake to acquire this land, that the property were needed for some purpose whatsoever other than for public use. It might be for a private use, or it might not be for such public use as was contemplated by the amendment to the Constitution, it seems to me.

Continuing the words of Story:

It is a great principle of the common law, which existed anterior to the Constitution and to Magna Charta, and which was embodied in the twenty-ninth article of that great charter: "No freeman shall be taken, or imprisoned, or disseized of his freehold or liberties, or otherwise destroyed, but by lawful judgment of his peers, or by the law of the land."

Then authorities are cited:

This is an affirmance of a great doctrine established by the common law for the protection of private property. It is founded on natural equity, and laid down by jurists as a principle of universal law. (Story's Constitution, sec. 1790, and authorities there cited.)

* * * * * * *

A "public use" means a use concerning the whole community, as distinguished from particular individuals, though each and every member of society need not be equally interested in such use. (Paschal, p. 262.)

I will not take the time of the committee to go into this further, but, as I say, under the provisions, as I read this bill, "for any purpose whatsoever" does not necessarily comprehend solely public use.

I do not know what has been said here. I am not prepared to properly discuss this bill, and I do not want to take the time of the committee in a rambling way expressing my views in respect to this proposed measure.

These are the leading objections. There are other objections, many objections, which I think make this bill improper matter for legislation.

Beginning with the first section, the title of the bill is objectionable. It provides "for the protection of the interests of the United States in lands and waters comprising any part of the Anacostia River, or Eastern Branch, and lands adjacent thereto, and for other purposes."

Now, "lands adjacent thereto"—I do not know whether that would reach your State or not, Senator. It would reach—and it might be presumed to go—very far beyond the immediate confines of the stream, though.

And then in the bill itself it speaks of the shores:

Any part or parcel of the land or water in the District of Columbia within the limits of the city of Washington, or exterior to said limits, composing any part of the Anacostia River, or Eastern Branch, and Potomac River and Rock Creek, their shores and submerged or partly submerged lands, as well as the beds of said rivers or branch and the uplands adjacent thereto, including flats and marsh lands, for the purpose of establishing and making clear the right of the United States thereto.

To take one instance that occurs to me at this moment. I have no doubt you have seen the uplands adjacent to Rock Creek, and that they are quite extensive and lofty. This would comprehend a proceeding in respect to any of those hillsides along Rock Creek, and the same perchance, might be said as to the Anacostia River.

And the uplands adjacent thereto, etc., for the purpose of establishing and making clear the right of the United States thereto.

The substitution, I say, of this proceeding, in the nature of a bill in equity, for the common-law right of a man who is entitled to his property, not merely by reason of long possession of it, seems to me a flagrant violation of this common-law right. He should be dispossessed by an action of ejectment if he is to be dispossessed. He is guaranteed by the seventh amendment to the Constitution the right to trial by jury, where the value in controvery exceeds $20.

Senator BURKETT. Let me ask you a question. Do you raise a constitutional point on the proposed change of process from an action of ejectment to an action in equity?

Mr. E. F. ARNOLD. I think it is a violation of the common law which seems to be guaranteed by the Constitution, a substitution of

an equity proceeding for the common-law action of ejectment. I can illustrate that here by a case in point.

Senator BURKETT. You know this is a copy of another law by which the Potomac front was straightened out, do you not?

Mr. E. F. ARNOLD. Is it absolutely a copy? I know it is in the nature of a copy.

Mr. STRICKLAND. It is practically a word-for-word copy.

Senator BURKETT. It is practically a word-for-word copy as we are advised.

Mr. STRICKLAND. Except where it is necessary to be changed to make it fit this subject.

Senator BURKETT. What I am trying to get at is whether this question which Mr. Arnold is raising was raised in any of those cases under the other law.

Mr. STRICKLAND. It was raised in the lower court, but there is no provision in the Constitution of the United States as against a right of trial by jury in respect to the United States.

Mr. E. F. ARNOLD. I think there is in this case. The owner ought not to be dispossessed of his property except by the law of the land, and I think I have shown the law of the land, under the wording of Magna Charta, which is simply a reiteration of the common-law principle, and, as Story says, is "universal law." All British satuttes in force here are a part of the common law of this jurisdiction. Otherwise, these statutes could have no force or effect here.

I, personally, for example, am an owner of, and entitled to, the possession of certain lands on the Anacostia River which my family have been in possession of for more than half a century, and in the record title to which we have a deed from the United States Commissioners, and we have been continuously and uninterruptedly since then in possession of that land for way beyond half a century. It has not been out of the family at all in that time.

Over half a century ago there was constructed on firm land, land not subject to the ebb and flow of the tide, a stone mill—a heavy stone mill structure. That mill has passed into history. In the Senate and the House of Representatives bills have been introduced in respect to it.

That mill was used by the United States during the Civil War, and for a time all the ground feed that went to supply the cavalry station at Giesboro was ground by the machinery of our mill. It was a flour and grist mill. It was conducted by my father; it was owned by my father. There was no question as to his loyalty as a Union man—never any question—but the United States took that mill, and said that they needed it for their supply station at Giesboro—the cavalry station. All the horse food that was ground for the supply of that Giesboro station came from this mill. It was operated under the supervision of Army officers day and night, Sundays and all days, until the machinery was used up, and the mill absolutely ruined. And by reason of claims pending here in Congress to-day, or, at least, claims that have been introduced into Congress, in the Senate and the House, it is shown not only that the mill structure that stands to-day on lots 1 and 2, in square 979, was there in 1862 and 1863, but also, that as a mill it was, then, absolutely destroyed, the machinery completely used up, and that this flour mill was used for grinding horse feed, day and night, for several years to supply the United

States cavalry station at Giesboro. Then, when it was no longer of any use, because of its destruction, it was abandoned. Then, my father's business was gone. He had lost his business, his trade. It had been acquired by others. His mill was ruined, his machinery all destroyed, and himself impoverished. And to this day, not one cent of compensation has ever been received by my father or his children, who have since his death owned this property, for the taking of the mill by the officers of the United States Army and the consequent destruction of this private property and the losses thereby suffered.

Now, I mention this to illustrate what I have been saying. That was in 1861, 1862, and 1863, and the stone mill was there then; built on terra firma; built on firm ground that was not subject to the ebb and flow of the tide, and it was above and beyond the high-water mark; but notwithstanding that, as I understand from some of the officials of this commission, within the last few weeks, I have not seen it; I have just learned this within a few days—some officers of the United States, claiming to represent the United States have run a fence across that land, cutting off how much of it?

Mr. W. H. ARNOLD. Including the mill and other land to the north of the mill, and the tenants have refused to pay rent in consequence.

Mr. E. F. ARNOLD. The tenants have refused to pay what they owe. They deny their landlord's title, in consequence of this lawless invasion of private property—this outrageous trespass and flagrant violation of the rights of citizens to private property guaranteed by the United States Constitution and the law of the land. It is a stone mill that could not have been put up on ground that was subject to the ebb and flow of the tide; it was built there, as I say, early in the fifties; and our possession has been taken away from us—from all that property inclosed. A fence has been put across there, and it is claimed by the officers of the United States, acting in their discretion, for the use of the United States or, perchance,, the Pennsylvania Railway, or, possibly, for some other purpose. That fence is at least 75 or 100 feet north of the south confines of the mill, is it not?

Mr. W. H. ARNOLD. Yes.

Senator BURKETT. Let me get at it. It is very evident from your statement that there is a reason for some kind of legislation to straighten out these titles, because your brother can not hold that land, or can not collect his rents. The real question is, is this bill a proper way to straighten that out?

Mr. E. F. ARNOLD. I say not.

Senator BURKETT. I think in your address you have made a very clear case that there ought to be something done to straighten out these titles. The United States does not want the land, of course, if it does not belong to it. On the other hand, your brother wants it, if it belongs to him. He can not now dispose of that land, I suppose.

Mr. E. F. ARNOLD. The title is clouded.

Senator BURKETT. The title is so clouded.

Mr. E. F. ARNOLD. The title companies have refused to give a certificate of title to that land simply on account of this unwarranted trespass by officers of the United States.

Senator BURKETT. That indicates that something ought to be done to clear up these titles. Do you not think so?

Mr. E. F. ARNOLD. Yes; but do not let us say this: That where a man has been so long in adverse possession of property, and has a good record title thereto, he has not a right, if he is to be dispossessed, to have the matter tried out in an action of ejectment, with all its presumptions in favor of the possessor, instead of having substituted for it an action to be created by this proposed legislation, this novel proceeding—we do not know what it is really—something in the nature of a bill in equity or, perhaps, an interminable chancery proceeding, I suppose, having in contemplation a case like the celebrated Jarndyce *v.* Jarndyce.

This is proposed as a substitute for the action of ejectment, and I have illustrated it this way, showing that here the officers of the United States, within the last few weeks, have deliberately gone in there in this unlawful and unwarrantable way and taken possession. Last June you passed an act authorizing the Secretary of the Navy to deal with the Baltimore & Potomac Railway Co. or, rather, the Pennsylvania Railway Co., in respect to their entrance into the Navy Yard. I suppose this is in the line of the proposed entrance. I have not any definite information as to that fact, but I suppose this is in the line of the proposed entrance of the Pennsylvania Railway Co. into the Navy Yard. But here, in this case, they have taken possession in an unwarranted way of this occupied stone mill there. Ever since that mill was built the parts of the lots nearest the river have not only been in adverse possession but improved.

These parts of lots 1 and 2, in square 979, were so improved for years. They were so improved during the Civil War, when the Government of the United States, through its officers, used this flour mill on this land for grinding horse feed, and every bit of that land there near the water was covered by improvements then, and that it could have been subject to the ebb and flow of the tide then is absolutely preposterous, because if it had been it could not have been so improved. You can not build a stone building like that down in the river; and, anyhow, it was not so built; and at the time that the United States commissioners conveyed to the party, who conveyed to my father, this was the shore of the river, which was not subject to the ebb and flow of the tide. It was above high-water mark, and yet, notwithstanding that fact, this unwarranted proceeding has been taken in the name of the United States by officers of the United States, exercising, it may be claimed, their discretion, and in violation of law and disregard of the rights of citizens.

In conclusion, it seems to me that under the common law of the District of Columbia and the Constitution we are entitled to our remedy of an action of ejectment and to a trial by jury, and to the presumptions of law in favor of one in possession proceeded against in ejectment, and there should not be substituted for this remedy one that is novel in its character, in the nature of a bill in equity, that is grossly objectionable in many ways and entirely unnecessary and inexpedient.

Senator BURKETT. I am very much obliged to you, Mr. Arnold. Is there anyone else present who desires to be heard against this bill?

ADDITIONAL STATEMENT OF MR. FULTON LEWIS.

Mr. LEWIS. I can only say that I have been looking over this report, and I find that it is impossible to examine it in an adequate way here while argument is going on, and if this is the last hearing I suppose the only thing to do is to ask leave, on behalf of the chamber of commerce, to file some written answers.

Senator BURKETT. How long a time do you suggest that you should have?

Mr. LEWIS. I suppose a week. Would you take final action before the end of a week?

Senator BURKETT. It would be impossible to allow you a week. It would be impossible to allow that time if we are to get any legislation, because there are only two weeks left, after this, of the Congress. I suggest it should be filed by Wednesday noon. Then we will have a committee meeting Friday and that will give us an opportunity to consider it.

Mr. E. F. ARNOLD. I did not understand. You are giving him until Wednesday?

Senator BURKETT. Wednesday noon.

Mr. E. F. ARNOLD. Will that be applicable to any person as well?

Senator BURKETT. Yes.

Mr. LEWIS. I notice, as it seems to me——

Senator BURKETT. That is, it would be applicable to you, if you want to file a brief.

Mr. E. F. ARNOLD. I thank you very much.

Senator BURKETT. I would not want to allow that indiscriminately to every person. We might be loaded up with argument not bearing on the question.

Mr. LEWIS. It is possible that I might think of some further objections. I suppose I would have leave to file those; would I not?

Senator BURKETT. You may file them all in connection with the chamber of commerce, or are you going to file them personally, aside from the chamber of commerce?

Mr. LEWIS. That was my idea, that I might personally present arguments of my own. I shall report this matter to the chairman of the committee on municipal legislation of the chamber of commerce after leaving the meeting. I was simply asked to represent him here this morning because he could not be here. I think it is possible also that Mr. Brown, the chairman of the committee on legislation of the bar association, desires to file some written objections to this bill. He wanted to be here this morning, but could not, and I would ask that he be given leave, if he has any such objections, and desires to file anything in writing, to do so.

Senator BURKETT. If Mr. Brown makes the request between now and Wednesday noon, it will be all right. All we want to do is to make sure that we are not burdened by all sorts of anomalous and indiscriminate arguments. But anything that will throw light on this subject, whether from Mr. Brown or the bar association, or anybody else, we will be very glad to have.

Mr. E. F. ARNOLD. And from Mr. Worthington.

Senator BURKETT. I want to guard against having to print everything that comes in. If Mr. Brown will have his report in by Wednesday noon it will be all right.

Mr. E. F. ARNOLD. Mr. A. S. Worthington told me he wanted to be heard on this measure, and intended to telephone in regard to it.

Senator BURKETT. For whom does he appear?

Mr. ARNOLD. He said he objected to it.

Mr. LEWIS. He is also one of the members of the legislative committee of the bar association.

Senator BURKETT. If he and Mr. Brown will get their arguments all together there will be no trouble about it.

Mr. LEWIS. I was going to call attention to what seemed to me to be one or two objections that I was able to discern in this hasty reading of the bill. I did not have an opportunity of reading the bill until this morning, and did not know of its existence until last night at 6 o'clock.

It seems to me that this suggestion of Mr. Arnold's, as to these proposed equity proceedings assuming something of the nature of the case of Jarndyce *v.* Jarndyce is well taken; and in that connection I would call attention to a decision of the Supreme Court, not upon this question of title, but on the question of the combining of a large number of suits into one suit, so to speak. That is what is attempted to be done here, I understand. The case I refer to is that of Hale *v.* Allinson, reported in 188 U. S. Reports.

In that case it was attempted by a statute of Minnesota to provide that where a corporation of a certain class became bankrupt, all the claims against the stockholders of that corporation, under a law permitting them to be assessed a certain amount according to the amount of stock they held, should be combined in one suit, and all the different stockholders brought into that suit, and the rights adjudicated in that one suit. There would seem to be just as much ground for proceeding in that manner in such a case as there is in the present case. All the claims would arise from the same original incorporation, just as here it might possibly be said to arise from the same original division and action of the commissioners that the Supreme Court held there was not proper. They spoke of it as a congeries of suits, and said that it was more likely to result in inconvenience and injustice than to result in convenience and injustice because of the mixture of the different states of fact pertaining to each particular individual. They said each one of the stockholders would have separate grounds of defense and those grounds were apt to be very much mixed up. That a large amount of testimony might be taken, and it might become greatly mixed up.

Senator BURKETT. There is nothing in this bill that authorizes that, and much less directs it, is there? There is nothing in this bill that attempts to overcome that decision of the court.

Mr. LEWIS. Is it not intended here?

Senator BURKETT. I do not understand it is. I do not read anything of that kind.

Mr. LEWIS. You understand this to be a number of different suits, do you not?

Senator BURKETT. There is nothing one way or the other any more than there would be in any general law. Am I right in that, Mr. Gauss?

Mr. GAUSS. Yes.

Senator BURKETT. There is nothing in here that tries to overcome that case which you referred to. If those cases were attempted to

be collected altogether into one suit the Attorney General might meet the same fate that they met in this case. He would have to determine that in the light of that case, and bring his action.

Mr. LEWIS. Unless it were held that this bill overcame the objection of multifariousness, which in that case was sustained.

Senator BURKETT. There is nothing in the bill, as I read it, that attempts to overcome that case. That is the reason I asked Mr. Gauss.

Mr. LEWIS. I took my cue from Mr. Arnold's remarks. As I said at the outset, I have not had time to make a strict examination of the bill, therefore, I will not make any statement in that regard.

Mr. E. F. ARNOLD. This is a proceeding in the nature of a proceeding in rem, not a proceeding in personam. That is, it is final as to any person interested though not served with process.

Senator BURKETT. Each case that might be brought here is very necessarily an entirely different case. The evidence would be different in your case than in somebody else's case. They could not very well bunch them all together, it seems to me. However, I do not see anything in the law that directs or even contemplates any such thing as you suggest.

Mr. LEWIS. It seems to me if it is susceptible of that construction there should be an amendment to provide for bringing the suits in each particular case. That objection, you will admit, is certainly a very strong one.

As to section 8, I will say that I have noticed that this letter of Mr. McNamara's says very little about it.

He simply states that he thinks Mr. Weller has misconstrued the object and meaning of that section, and it throws very little light on that subject. If, as Mr. Weller states, in the communication of the committee on municipal legislation of the chamber of commerce, there is already adequate provision of law under which the United States can acquire lands when needed, it seems to me it would be a very foolish thing to load the statute book with further provisions. Those provisions of law were carefully studied by this committee, and by the committee of the House, at the time they were enacted, I believe, and they have been subsequently amended from time to time so as to remedy what defects originally existed in them. I remember drawing one amendment myself to try to cure such a defect, and it was passed upon by this committee, favorably reported by this committee, and became a law.

It seems to me that such a provision as section 8 would be productive of a great deal of injustice in this: That it would perhaps permit persons who represented the Government—upon their belief that land was necessary for some use of the Government—to institute proceedings before any appropriation was made for payment of the money, and I take it that even should this section pass, there is nothing in it to amount to an appropriation of money for payment of the land. It would permit such a proceeding to be instituted merely as appraisement proceedings. Those proceedings always have the effect of clouding the title to the property, the preventing the owner's disposing of it or doing anything with it, and so we would have a large number of proceedings brought which never would, perhaps, in the end amount to anything but the clouding meanwhile of the title of the owner.

Senator BURKETT. You think that is entirely unnecessary in the bill, do you?

Mr. LEWIS. I think it is unnecessary. I think it is alien. It ought not to be there. It is a rider, so to speak, and it is subject to the objections that nearly always attach to the riders to bills, that they go through without due consideration, if they do go through at all, and usually do a great deal of injustice in the end.

Another provision in the bill to which attention has been called is that as soon as the award is made the money is to be deposited in the Treasury of the United States. Why, it is already there; it always is there—the money of the United States. But I suppose it might be considered to be paid there to the credit of the cause—to the credit of some particular fund. Supposing that were the case, it puts upon the owners the burden of securing a judgment of the court formally establishing their right to this fund before they can receive it. Does that seem to be a compliance with the provisions of the Constitution for just compensation? The Supreme Court has decided that in the act providing for the taking of property provision must always be made for the payment of the compensation in order that the proceeding may be valid. I had cause recently to look into that question.

Senator BURKETT. You gentlemen think there should be a provision in here to determine the rights of the opposing parties, as well as the rights between the Government and those claimants?

Mr. LEWIS. I contend that in order to be a just provision, this should in the ordinary form provide that all persons interested in the property should be served with notice and brought in, in the ordinary way, and that when the Government takes their land they should be paid for it and not be left——

Senator BURKETT. But there should be an order in regard to the distribution at the same time. Is that the contention?

Mr. LEWIS. I think the taking of the land should be coincident with the payment of money—the actual taking over of the land. That same provision was made in a bill which is now before the court in a case here, the provision for the Sixteenth Street Park. The committee which had charge of it was very careful to provide that the money should be paid over; that the land should be taken when the money was paid over, paid into the court.

Senator BURKETT. Where is that? As I recall it, it was to be paid to the court in case there was a contention as to who were the proper parties to receive it.

Mr. LEWIS. It did not so provide. The provision was that all money should be paid into the court.

Senator BURKETT. Can you call my attention to where that provision is in this bill. I do not see it.

Mr. LEWIS. It is on page 7.

Senator BURKETT. Page 7, in line 7? I do not read it that way. It may be that my hasty reading is defective.

Mr. STRICKLAND. Line 18.

Mr. LEWIS. It reads that "when such report shall be confirmed by the court the amounts so awarded shall be deposited in the Treasury of the United States to the credit of the owner or those interested in the land, easements, or rights sought to be condemned, and the

said amounts shall be paid out to any person, persons, parties, or corporations, or others only upon a judgment of said court on their showing their right to receive the same, or any portion thereof, and when said amounts awarded shall have been so deposited in the Treasury of the United States the said land, easements, or rights shall be deemed to be condemned and the United States may take immediate possession of the same and hold the same by a fee simple title for the public use."

The Government treats them as the owners for purposes of notice, and yet proposes to hold that money in the Treasury until they can affirmatively procure some judgment showing that they are entitled to the money, and it makes no provision whatever in any portion of this section for the payment of the costs of the proceedings.

Mr. MCNAMARA. You can not get anything without showing your right to it.

Senator BURKETT. I think what he is contending for is this: As I read that bill I thought there was a contest between several parties claiming an interest in a piece of property——

Mr. LEWIS. That is the idea.

Senator BURKETT. As is done in the distribution of estates, and where there is a difference. We have statutes usually providing that where there is a contest over money, as to whom it should go, it can be paid into court. I thought as I read over this bill that was what it provided, but after looking at it again I think that perhaps Mr. Fulton's contention is correct. In this case the money is paid in, and the claimants have to file a different suit to get it.

Mr. MCNAMARA. That is not the intention.

Senator BURKETT. I could not believe that was the intention, and that is why I asked him. His contention is that there should be a decree when you have a finding here. The bill provides that the "commissioners shall thereupon, after being duly sworn for the proper performance of their duties, examine the premises and hear the persons, parties, corporations, or others who may appear before them and return their appraisal of the value of the interests of the same, respectively, in such land; and when such report shall be confirmed by the court the amounts so awarded shall be deposited in the Treasury of the United States to the credit of the owner or those interested in the land," etc.

His contention is that when the court confirms the finding of the commissioners that they should distribute right there the money to whom it belongs. That is what you are contending for, to make one suit end it all, is it not?

Mr. MCNAMARA. I do not see how properly or reasonably it can be argued that, under that provision, another suit would be required for the property owner to get his money. It is to prevent inconvenience both to the property owner and the Government that it is provided that the money shall be paid into the Treasury of the United States. Under the act of August 31, 1890, known as the Printing Office act, when these proceedings are had, this money is available for payment. The Government, through the President, must determine what particular individual is the owner of the property taken and who is entitled to receive the fund, and in the great mass of business which the Chief Executive has, it operates to delay matters a great deal.

Senator BURKETT. You think this could not be anything more than that the owner should identify himself?

Mr. MCNAMARA. Nothing more than to have known who is entitled to it and to whom it is due, as we do every day in partition suits, and have it paid over to them.

Mr. LEWIS. Is not this the sum and substance of it? At present, after the Government shall have determined what is the value of the land, by the appraisement of the commissioners, the practice is that the Government then is put upon the necessity of deciding whether or not it is willing to accept the title to the land. Is that not correct?

Mr. MCNAMARA. No. We then have to take the matter up to the President and reinstitute the whole proceeding, explain it to him, and have the property owners wait for their money. Under this proceeding it is very much more facile. We can have the same proceeding, and an order of the court directing the money to be paid to the property owners.

Mr. LEWIS. You gentlemen contend that can be done without an appropriation.

Mr. MCNAMARA. You can not get money anywhere without an appropriation.

Mr. LEWIS. Then, if it is necessary to have an appropriation each time, why not let the same course be pursued as has been pursued in the past? Why have a general provision under which the property of the various persons can be tied up, when it is never going to be known whether Congress is going to make an appropriation or not?

Mr. MCNAMARA. There is no property going to be tied up. Let us consider appropriations when we come to them.

Mr. LEWIS. You do not propose to submit to Congress the question whether it is necessary for the use of the Government or not?

Mr. MCNAMARA. Why, absolutely. We can not do very much without Congress's friendly aid in the way of appropriations.

Mr. LEWIS. That is not the question. You are touching on a question which is different. The point here is, Are we to have put upon the statute books a statute under which various Government officials—this does not designate anyone to decide the question—who happen to think that land is needed for purposes of the Government, can start the machinery going, have the land appraised, have the titles thereby clouded, and prevent the owners doing anything with it, when you are totally uncertain whether Congress will ever permit it to be used for public purposes or not?

Mr. MCNAMARA. You have that on the statute books already. It has been on the books for 25 years. Whenever the Secretary of the Treasury deems it essential to acquire property for public buildings he is authorized to proceed. Do not let us get astray by discussing these remote questions. If I may have a few minutes——

Mr. E. F. ARNOLD. If we have it on the books why reenact it if we have this section 8 already on the statute books?

Mr. MCNAMARA. I did not say that. I said the Secretary of the Treasury has the right to acquire property for public buildings.

Senator BURKETT. Have you finished, Mr. Lewis?

Mr. LEWIS. No; I have not. I contend that any provision of this kind should exist only when there is a condition precedent that Congress shall have determined that the property is necessary for the

public use or that there be a determination by some court of that question. I think there is now a provision permitting the Commissioners of the District of Columbia to acquire property for purposes of schools, and certain other purposes; but, as I recollect it, it is necessary in that provision to show that the property is necessary for the public use, and it seems to me that no such provision as is proposed here should be enacted unless there is some provision for ascertaining that point.

I also, I think, noted the fact that there is no provision made in this section anywhere for the payment of the cost of the proceedings.

As to the determination of the rights of owners being in the same proceeding or another one, I think that is a mere matter of form. Admitting that it might be done in the same proceeding, I did not intend to argue that it should be done in a separate suit. I think the question whether it comes under the same entry of the court's docket would make very little difference in the inconvenience to the property owner. If he is put to the necessity of proving his title, instead of as at the present time the necessity being upon the Government to have the title examined to decide for itself whether it regards it as complete or perfect or not, I think it would be a great hardship upon the owner.

The present course, as I understand it, it that when the Government is about to take over a piece of property after an appraisement the abstract of title is examined by the Attorney General to determine whether or not he considers the title of those to whom the money is to be paid a perfect title or a good enough title to warrant a payment of money. It seems to me that the Government, like any other purchaser, should decide that question for itself, and not leave it up to the property owners to prove their titles at their own peril after having the possession of the property taken away from them. If the Government does not consider their title good, it should not take the possession of the property away from them before the court's determination of the question.

Senator BURKETT. Is there anything else, Mr. Lewis? If not, we will hear from Mr. Edmonston.

STATEMENT OF MR. W. E. EDMONSTON.

Mr. EDMONSTON. I have only looked at this bill from the point of a title examiner; not with respect to its public features.

Senator BURKETT. I want to say to you, Mr. Edmonston, that we know of your experience in titles of the District of Columbia, and feel confidant that you can give us a great deal of information.

Mr. EDMONSTON. I have only examined into the matter as a real estate man. We do not want to have any doubt about our titles. We want to read those clear always. The first section of the bill struck me as being a little assumptive in its character. It assumes, apparently, that the United States has title to the Anacostia River, which it has, we think, and to the Eastern Branch of the Potomac River, but possibly not to Rock Creek, except a small part of it, and not to its shores, except under certain circumstances, and certainly not to uplands adjacent thereto. That is pretty broad, and as said by one of the gentlemen who just addressed the committee, there ought to be some limitation there.

Mr. GAUSS. Excuse me, Mr. Edmonston, may I not suggest that the limitation is the right of the United States?

Mr. EDMONSTON. I was going to make a suggestion. I have penciled here an amendment, reading—

for the purpose of establishing and making clear such right as the United States may have thereto.

Mr. GAUSS. Is not the present language the same thing?

Mr. EDMONSTON. It directs suits to be entered.

Mr. GAUSS. For the purpose of what? We think if the Government has not any right you can not establish and make it clear.

Mr. EDMONSTON. Is it quite the right sort of legislation? It assumes that all those properties belong to the United States.

Mr. GAUSS. I do not read it so. The fundamental proposition is the right of the United States. That limits everything there is in the clause. If the United States has no right, no color of title, the United States has no ground for proceedings. If it has a right and color of title it ought to be permitted to assert its claims.

Mr. E. F. ARNOLD. If it means that, why not say it? Why not say what Mr. Edmonston says, if it means that?

Mr. EDMONSTON. I only glanced over that as a possible objection. I suppose if we examined a title on the uplands that the United States has no right to unless some suit has been actually filed, we would pass it. We would have to do that. They would have to file the suit to establish the right of the United States to those various properties. I only suggest it would be more appropriate and that would follow, I think, the act in all those cases.

Mr. GAUSS. This is the exact language of the Potomac Flats act.

Mr. EDMONSTON. Is it?

Mr. GAUSS. Yes, sir. There is no doubt in your mind that the United States has title to the bed of the river and all the land made by artificial means.

Mr. EDMONSTON. It was so decided.

That is the only formal objection I have. I was only interested in the second section, Mr. Chairman, and it has been agreed that the words "fairly and equitably" will be eliminated.

Mr. GAUSS. I think there is no objection to that, sir.

Mr. EDMONSTON. I suppose the provision as to vacant lands will affect practically very little land, principally where the lines of the old patents do not come together—where there is a little sliver or parcel of land which was left out by reason of faulty surveys or something of that kind. Of course it might work a hardship if the United States should undertake to recover those little slivers in between those tracts, because they have mostly all been in possession of parties ever since the District was laid out. So far as my experience extends, there has never been any body of land found in the District of Columbia which had not been patented under the Maryland patents except possibly those little slivers that came between surveys, and it seems to me that it would be rather a hardship, in one sense, if the United States should attempt to recover those.

Before Congress undertook to pass this act of 1839 to provide for the issue of patents, the State of Maryland actually undertook, possibly without legal authority, to issue a patent on some of those little

slivers, as I designate them. It would be a hardship, probably, to have proceedings instituted in those cases.

In view of what is understood to be the broad purpose of this act, in order to establish a proceeding for getting rid of our marshes over in the northeast, it might be well to leave that whole section out—section 2. Nobody has ever contested or set up any claim, I believe, to the public reservations or the parks or streets or avenues or building spaces.

Mr. GAUSS. You are not sure of that, are you?

Mr. EDMONSTON. I am not sure.

Mr. GAUSS. How about Fox's discovery?

Senator BURKETT. You suggest leaving out all of section 2?

Mr. EDMONSTON. I would leave out all of section 2. Of course, the United States, if it has a right to any parcel of land in the District of Columbia——

Mr. GAUSS. How about square 825?

Mr. EDMONSTON. We do not want to create a distrust as to the land titles in our District. So we do not want to have the act point out anything more than is absolutely necessary for the real purposes of the act.

Of course I have not, as I say, looked at the act with reference to anything more than those parts.

Senator BURKETT. Is there anything more? You and Mr. Gauss will get together on that amendment on page 3.

Mr. E. F. ARNOLD. Mr. Chairman, just one word more. To be fair to the gentlemen representing the United States, or this bill, rather, I should like to say just one word more before Mr. McNamara starts on his argument. The claim has been made by the secretary of the commission, as I understand—Mr. Gauss, you are not a member of the bar, are you?

Mr. GAUSS. No, sir.

Mr. E. F. ARNOLD. You are a law student, as I understand it?

Mr. GAUSS. No.

Mr. MCNAMARA. He is not a law student.

Mr. E. F. ARNOLD. You are studying law, as I understand?

Mr. GAUSS. No, I am not studying law. I am the secretary of the commission.

Mr. E. F. ARNOLD. Then you are a layman. You are not a lawyer. Mr. Gauss says this is the identical language of the Potomac Flats act. It is on his assurance that we are to credit that.

Mr. GAUSS. Excuse me, I did not draw this bill. Mr. Strickland drew it.

Mr. E. F. ARNOLD. I gathered from the character of the bill that a layman had drawn it

Mr. STRICKLAND. Thank you.

Mr. E. F ARNOLD. I did not mean anything uncomplimentary. Some of the language indicates that its authorship might be that of a layman.

But what I want to say is this: Assuming that this is identical with the Potomac Flats act, it is a matter of common knowledge that the rights on the Anacostia River or the Eastern Branch, or Rock Creek are not identical. The rights of the Government of the United States here are not identical with those which were in question in the Potomac Flats act. Now, then, how will this act fit this case?

The rights are different. There has recently been published, and this committee ought to have possession of it, I assume, although I have not seen it, another opinion of Mr. Taggart's that I understand is out. Anyhow, he told me so, and his son told me so. Mr. Taggart told me personally that the rights of the Government on the Anacostia River were not at all identical with those on the Potomac River, and he said he was very frank to say that he did not see how it would ever be possible for the United States to settle the rights of all the owners on the Anacostia River in an equitable and fair way, or in any possible way that would not be an outrage, except by establishing a new water line along the Anacostia River.

Mr. Taggart, who has studied this question very laboriously and lengthily, and upon whose learned researches the gentlemen very much rely, has said that, and I think we ought not to disregard it.

Senator BURKETT. We will get that opinion. I understand it is here.

Mr. MCNAMARA. We have it here.

Mr. E. F. ARNOLD. I do not want to be understood as saying that any litigation has been instituted as to this mill. I thought perchance what I said about this suit being instituted and my brother not knowing about it might be construed to mean that a suit had been instituted in regard to the mill property.

I think, as a final word, if this bill is to stand, we ought to make the language thereof clearly express the meaning intended, and that always ought to be the rule. I remember, in my school grammar, this final rule, as I recall it, that we should so use the English language that not merely may one understand, but that one must understand. Now, then, if you mean, as the secretary of the commission says—and he says he is not a lawyer, and is not even a student of law, but a layman—yet, as he undertakes to tell Mr. Edmonston, a man who has been at the bar for years, and whose opinion is respected by all of us who know him—that what this act says, of which this gentleman does not claim the authorship at all, is identical with what Mr. Edmonston says it should say to mean, what is right and fair in the premises, viz, "such right as the United States may have thereto."

I think if this act is to pass, including that provision, those words of Mr. Edmonston ought to be injected therein, so that, if that is the meaning, it should be clearly expressed. Let us say what we mean.

Senator BURKETT. Now, Mr. McNamara, will you close the argument?

STATEMENT OF MR. STUART MCNAMARA.

Mr. MCNAMARA. If the committee please, within the common knowledge of all title lawyers in the District of Columbia, and the courts, the United States has title to certain interests in certain lands in the original city of Washington. That interest is derived from the original deeds of trust given when the city was laid out, and from the decisions of cases in courts that have had to do with the construction of those deeds. A great addition to that knowledge was the decision of the Potomac Flats case, which was, of course, rendered under the jurisdiction conferred by the act of 1886, which act is followed to the letter by the act which we have here before us.

The Government finds itself in the position of knowing that while it has this title to certain tracts of lands in the city, and certain por-

tions of the land adjacent to the river, there are private parties who have encroached upon that land, built wharves, built mills, derived revenue from them for many years, handed them down to their descendants who are in possession, and if the Government wants to get possession of that property it must go either into the municipal court and start a landlord and tenant suit, in the nature of an action of ejectment and ouster, or it must go into the supreme court of the District of Columbia and file an ordinary action of ejectment. If it does that, it abandons its claim of sovereignty and submits itself to the terms and conditions affecting a private litigant. The futility of that has already been demonstrated.

Hence the Government resorts to its constitutional right of going into equity. That was the method that the common law provided in regard to persons who got on the Government's land.

My good friend here, Mr. Arnold, has talked about the common-law right between the person in possession and the Government. There is no common-law right of ejectment. When the language that he cited from Magna Charta was written, the action of ejectment had not been dreamed of, and it did not come into existence until three centuries after 1250. Before that time all of the titles were in the king. No one had more than a life interest in the land, as my brother Edmonston can verify. It was not until the statute of thirty-second Henry VIII that a right of disposing of property was allowed, and even then only of a portion of what a man held. It was not until the statute of twelfth Charles II that he could dispose of the rest of his property.

Whenever the king found anybody on his land it was the presumption that the king was in possession. The method used was the filing of a bill of equity to secure a mandatory injunction which commanded him to get off the land because he was committing a purpresture. When our Constitution adopted the terms of the common law it adopted with them all the meaning those words then had.

The Supreme Court when it laid down the rules of practice said: "This court follows the rules applicable to the practices of the courts of King's Bench and of Chancery, creating an eternal barrier between the jurisdiction of law and equity," with the result that to-day in the Federal courts in the State of New York the original distinction is maintained, although you may go around the corner to the State court and find it entirely abolished.

When the Flats case was before Congress, the question of procedure had consideration, and the procedure was adopted of going into a court of equity, and there is nowhere in the debates on the passage of the act of 1886, or in the great mass of court procedure which followed, covering more than 10 years, any attempt to urge that the method of procedure in equity was improper, unconstitutional, or derogatory to the rights of any claimant. On the contrary, Mr. Justice Hagner, delivering the opinion of the lower court and following the Supreme Court of the United States in Van Ness *v.* City of Washington, announces with very evident satisfaction that he is able, under the terms of the act of 1886, "to waive all consideration of minor objections and proceed at once to the consideration of the substantial ground" of the matters before the Court.

Does this bill deprive the citizen of any right? It gives him a hearing. It provides he must be served with process. If he can

not be found he is served with process by publication. That is nothing revolutionary. It is done every day in partition suits. It is done every time there is a contest as to a piece of land, and you can not get all the parties in without serving some people who are out of the jurisdiction. It is done in cases of partition of a particular fund. It is the law of the land. It is what is called due process of law. So there is no complaint from the constitutional standpoint on that ground.

Brother Lewis tells us that there may be a great inconvenience in the way of multiplicity of suits, but I think that is hardly exact. When a bill is passed, which provides for procedure in a court of equity, such procedure is immediately hedged about with all the limitations of a suit in a court of equity. And if a bill which the Attorney General should draft was not free from multifariousness, multiplicity, or repugnancy, or any of those grounds in which a bill in equity may be assailed, the bill will be attacked. It will be vulnerable, and can be attacked on such grounds.

But do not let us be troubled about that. Even under the language of the code, in ejectment proceedings, you may hale anyone in who has any title to the land, and you will get 30 or 40 different people impleaded in the same suit to see if they have any interest in the same land.

Mr. LEWIS. It must relate to one specific piece of land.

Mr. MCNAMARA. That land may be very extensive.

In section 2, objection has been made to that part found beginning in line 10. I read the language:

Within the limits of any public reservation, park, road, street, avenue, or building spaces.

In the laying out of the city there were certain areas resulting from the meeting of three or four streets and avenues, and the space left was so small that it was not deemed wise to make it a building square, and there remained therefore these portions of public space which were included in the street space.

Now, the United States, under the decisions of the courts, has the title to that space in absolute fee. In some cases private persons have gone on there and taken possession of the property. The United States, finding that some of its titles have been assailed in this manner, would have to file suits. The language which was inserted in section 2, lines 9, 10, and 11, makes provision for that.

Then some portion of the building lots which were originally given to the United States have not been sold but they have been taken possession of by private persons. This section gives the United States a fair and reasonable means by which it may seek to secure its property.

The last part of section 2 has to do with those possible small tracts of land which answer the description of the vacant lands, which, under the act of 1839, could have been entered under the provision of the Maryland laws, and which have not been conveyed by patent. There is a possibility that such small pieces may be found in the District outside the city of Washington, and the present uncertainty with respect to their title should be determined.

This suit has for its object much more the quieting of titles for the benefit of the individual than it has for its object the securing of property for the Government. If in the process of suit the Govern-

ment should find that there is simply a naked legal title in the Government, the court is authorized to make such decree as may be necessary to vest the legal title in the person or persons equitably entitled thereto.

Senator BURKETT. Why is section 8 in there?

Mr. MCNAMARA. Section 8 is put in there for this purpose: The present way of securing property is by what is called the printing office act of August 30, 1890. That requires that after they have condemned the property and taken it, and have the money ready for payment, they must go to the President and have him approve the proceedings. If they satisfy him that they have found the right person as the owner, they have the President authorize the payment of the money by warrant, practically putting upon him the burden of approving the title.

That operates, as has been found in practice, to cause great delay. We wish to make this modern and conform to the procedure between private parties in actions of partition or in cases of ordinary transfer. Under the proposed proceeding the Government files its petition, secures an appraisement and a decree for the compensation to be paid, pays that into the Treasury and takes the land. The Treasury, of course, is simply the bank of the Government, as if, for instance, Mr. Edmonston and I were trustees of some fund, we would pay it into some bank, and hold it there until we knew who were the proper persons to receive it.

Now, in the same proceeding being in equity, the court has complete jurisdiction to give full relief to the parties; and to pass an order decreeing that this money be paid out to John Jones and not to the other brothers of the same family. It may so happen that John Jones is the legal owner of this whole tract. That decree is taken to the Treasury, and the money is paid out upon its warrant.

The advantages over the present system are these: Under the present system it may be that John Smith, who is living at the time we proceed to take his property, may die before we get through with the proceedings, and he has two children surviving him, and two predeceased children who in turn have children. We have to get all those parties in and let the President satisfy himself which one of these individuals is the proper owner to pay the money to. We propose here to transfer the burden to the court, which we think is the proper tribunal in the eye of the law to do that, rather than the President.

Our friends seem apprehensive that the land might be taken not for public use.

Section 8 which the Senator referred to, where it says lands which "are needed for the use of the United States for any purpose whatsoever," would be adequate simply with that restriction, because there is nothing that can be for the use of the United States which is not a public use. At least, I cannot conceive it.

If we have any doubt, let us turn to section 3736 of the Revised Statutes, which, of course, is the fundamental and outlying limitation on all special legislation. It provides:

> No land shall be purchased on account of the United States except under a law authorizing such purchase.

Unless we get the appropriation to apply to taking a particular piece of property we are powerless to proceed. This has to do not

with the fact of purchase, but with the proceedings of purchase. It has to do not with the question of land to be acquired, but with the method of acquiring it, and what the act tries to do is to remove the hindrances of the present procedure and give the Government a more modern method.

Mr. E. F. ARNOLD. It does not purport to do that.

Senator BURKETT. This section is entirely separate and distinct from the rest of the bill, is it not?

Mr. MCNAMARA. Yes; this section 8 has nothing to do with the rest of the bill, but it is necessary legislation in view of considerable takings of land already authorized by Congress, and it supplements the present bill from the point of view of the Anacostia River improvement since it provides a method for securing land for that improvement to which the United States has no present basis of claim.

Mr. E. F. ARNOLD. It is, perchance, my misfortune that I am not so well known to the last speaker as a lawyer as he is known to me. Within the short time since he migrated to New York he appears to have forgotten many things and me, also.

Senator BURKETT. We do not have time for these courtesies that are being passed backward and forward.

Mr. E. F. ARNOLD. I might inform Mr. McNamara that it is highly probable that I was in the active practice of the law when he was in swaddling clothes.

This is the point that I wish to give him the opportunity to answer: If this bill is passed, will not it say, as acts ordinarily do, that all acts or parts of acts inconsistent with this act are "hereby repealed," and would not the sections of the Revised Statutes referred to be repealed thereby?

Mr. MCNAMARA. The act does not say it, so do not let us speculate about it.

Mr. E. F. ARNOLD. The later act would repeal the earlier act.

Mr. MCNAMARA. It is not inconsistent with it. It must all be considered in pari materia.

Mr. Chairman, have you any more questions to ask?

Senator BURKETT. As I read the bill through, I made a note here that this section reads as if it belonged to another bill—a separate subject.

Mr. MCNAMARA. It is probably a proper addition, but not indispensable.

Mr. LEWIS. There is just one other point I should like to inquire about. I should just like to ask this question: Why not amend the Printing Office act, if it needs it, rather than to pass something inconsistent or rather, something not germane? I should like to call the chairman's attention to the fact that it is admitted by the Government's attorney that under the last section there would be a congeries of suits in the one suit for the purpose of determining the rights of the various people to their funds.

Senator BURKETT. That is section 8.

STATEMENT OF MR. R. T. STRICKLAND.

Mr. STRICKLAND. I wish to say that I drew this bill after a careful consideration of the matter and after consulting with the higher officials of the Department of Justice, and that in drawing the bill

we have followed the act under which the Morris case was instituted and the decisions in that case. It is not the purpose of the Government to do anything to injure any person. We simply want to adjust the rights of all parties concerned, both for the benefit of the Government and for the benefit of any person who holds titles or claims thereto.

The condemnation proceedings contemplated in section 8 are proposed for the purpose of simplification of the present methods, and to allow the Government to obtain title without waiting a long time to settle to whom the money is to be paid.

Thereupon, at 12 o'clock, the hearing was adjourned.

(The following letters were subsequently received and ordered to be printed:)

WASHINGTON, D. C., *February 14, 1911.*

DEAR SIR: I have been informed that at a recent hearing before your committee the passage of Senate bill 10136 has been urged largely, if not exclusively, upon the ground that the recent trial before a jury of an ejectment case relating to the property sometimes designated as Fox's discovery had demonstrated that the United States required the protection of some other method of legal procedure than jury trials for the assertion of its property rights; and, as I was of counsel for the defendant in the ejectment case in question, I have been requested to state to your committee the facts in regard to it.

The action was brought to recover some half dozen lots north of Florida Avenue, which, more than 20 years ago, had been purchased in good faith in ordinary course, and after due title examination and report, and had been improved by the erection of a number of dwellinghouses at the outlay of some thirty or more thousands of dollars. The United States brought ejectment suits, claiming that the property lay within the land assigned to the Government as the site of the city of Washington by George Peter, one of the original proprietors, while the defendants contended that it lay without the boundaries of that assignment. The testimony showed that there was considerable conflict in the early maps and plats of the city, some placing the ground in question within and some without the city boundaries, but that ultimately William Forsythe, for about 40 years surveyor of the city, and a Mr. Carpenter, who was for many years county surveyor of the District of Columbia, had concurred in the view that the ground was not within the city limits. The proof of the Government, itself, showed that the lots had been assessed for taxation as county property, outside of the city boundaries, as far back as the tax records could be traced; that the Government had had official notice that the land was claimed and occupied as private property as far back as 1868, and that it had not only done nothing in the way of asserting title, but had allowed the owners to pay taxes, to erect buildings, and to make other outlays without objection, until the institution of the ejectment suits. Upon this evidence the jury found that the land lay outside of the city limits, and the trial justice, on a motion for a new trial duly presented and argued, was satisfied with the verdict, and refused to disturb it. Any effort, because of the history of such a case, to enable the Government to seek to deprive a citizen of his property without the right of trial by jury, even supposing that such legislation would be constitutional, I submit can not commend itself to the favorable consideration of your committee.

The bill appears in other respects to be gravely objectionable. It provides, in effect, that in any case in which the Government claims a right of property as against the citizen it may institute, not a common law, but an equity proceeding against him to recover the property from him; that, if he is a nonresident, he need have no other notice than the publication in a local newspaper, which he may never see, and then by an *ex parte* proceeding, of which he need have no notice save such newspaper advertisement, he may be ousted of his title by a decree of the Supreme Court of the District of Columbia, which will be final and conclusive, without right of appeal or even of review by the Supreme Court of the District of Columbia itself, should he obtain notice after decree and seek to be heard.

To illustrate how the bill, if enacted as a law and held to be constitutional, would operate, I submit the following:

The owner of the New Willard Hotel, in this city, who is a nonresident, received notice a short time ago from the secretary of the commission under whose auspices it is understood the bill in question is being urged, that his title to the land upon which the hotel stands is defective, in that, although it was purchased from and duly paid for to the Government by his predecessors in title, the deed was not recorded within the time then prescribed by the statute. Under the provisions of this bill, should it be passed and could be held valid, a bill in equity may be filed in the name of the United States claiming the New Willard Hotel property, of which the only notice to the owner will be a newspaper advertisement, which he may never see, and the case may then proceed *ex parte* and by default to a decree, which will be final and conclusive against the owner. I am informed by the title companies that many notices have been sent out to property owners of alleged defects in their titles similar to that last above noted.

The claim, which I understand has been urged before your committee, that the Government does not receive fair treatment at the hands of juries in this District will not, I am sure, be corroborated by the bar, or by the bench of the District, or any of its members. The only instance of such a charge which has come to my knowledge during the 35 years of my practice at the bar is the one made in advocacy of this bill, and because of the dissatisfaction of the counsel for the Government in the ejectment suit above noted.

That the proposed legislation would be violative both of the letter and of the spirit of the Constitution, I think will be readily apparent to your committee. Section 2, Article III, of the Constitution, declares, "The judicial power of the United States shall extend to all cases in law and equity arising under its Constitution, the laws of the United States," etc.; and the seventh amendment provides that in suits at common law, where the value in controversy exceeds $20, the right of trial by jury shall be preserved. These constitutional provisions have been uniformly construed by the Supreme Court of the United States to preserve and perpetuate, as a matter of constitutional law, he distinction between legal and equitable jurisdiction, as known and understood in the jurisprudence of the parent country at the time of the establishment of our Nation. (Parsons *v.* Bedford, 3 Pet., pp. 446–447; Fenn *v.* Holme, 21 How., 481; Fitts *v.* McGhee, 172 U. S., 516, 531, etc.) Senate bill No. 10136 proposes that a party out of possession, namely, the United States, claiming real estate, may disregard the complete, adequate common-law remedy by ejectment, and, contrary to the jurisprudence of the parent country and of our own prior to the adoption of the Constitution, sue in equity, thus depriving the defendant of his right to trial by jury. Such a measure, I submit, is directly in conflict with both the letter and the spirit of the Constitution, and, even if it were not so, is highly objectionable in principle and wholly unnecessary.

Yours, very truly, J. J. DARLINGTON.

Hon. JACOB H. GALLINGER,
Chairman District of Columbia Committee,
United States Senate, Washington, D. C.

WASHINGTON, D. C., *February 14, 1911.*

Hon. J. H. GALLINGER,
Chairman committee on the District of Columbia,
United States Senate, Washington, D. C.

DEAR SENATOR: Referring to the bill S. 10136, "providing for the protection of the interests of the United States in lands and waters comprising any part of the Anacostia River, or Eastern Branch, and lands adjacent thereto, and for other purposes," I beg to submit:

I. Section 1 describes the locus of the litigation authorized as expressed in the title of the bill, but section 2 authorizes suits against any private individuals holding title anywhere in the District, including all "building spaces," and "in all lands which have not been fairly and equitably divided between the public and the original proprietors of the land on which the city of Washington was located, in accordance with the terms of the trust deeds entered into by said

original proprietors," and, also, all outlying lands now occupied by thousands of people with valuable improvements aggregating vast values.

The division, "between the public and the original proprietors of the land on which the City of Washington was located" was made a century ago. All abstracts of title to private holdings in the City of Washington begin with the statement, in substance, that in the original division of lots the lot to which the abstract applies fell to the United States or the original proprietor as the case may be, and that title is thereby traced either from the commissioners appointed by the United States to make sale of the public lots or from the original proprietor. During the intervening century and to this date hundreds of millions of dollars have been expended by the original owners of these lots in improvements; they have paid annual taxes for the support of the local government; in many instances lots have been sold for delinquent taxes and title passed accordingly. In every possible way the United States has recognized the original division of lots between the public and the original proprietors, yet under the provisions of this section, in all these large areas and in respect to all these enormous values, the proposed statute gives to a single administrative officer the power to bring suit against anyone and at any time. The title of the owner of the lordly mansion and of the humblest cottage is made subject to this broad power of attack. No one can rest secure. A century of undisturbed possession is not immune. No statute of limitations can be plead against the sovereign and no moral equity can be invoked. The defendant would be at the mercy of the United States, except as the conscience of the chancellor should stay the Government attack; otherwise resort to Congress would be necessary for protection and the measure of such appeals would be determined only by the extent of the litigation which is thus authorized and directly invited.

In strong and marked contrast with this proposed legislation under this section stands the action of Congress in the passage of the act approved March 3, 1891, making a limitation of five years against the United States in respect to patents issued for the public lands. The United States has thus wisely and justly placed a bar against attack upon its own titles outside of the District of Columbia, while section 2 of this proposed bill opens a veritable Pandora's box within the District of Columbia and subjects every individual title therein to the possibility of attack, although such record title may have stood for a century.

The marked injustice in thus giving such sweeping authority and making all titles held from the original proprietors subject to an attack on the judgment of one officer presents a case of glaring injustice, the magnitude and destructive consequences whereof can not be foretold. It would seem plain that as section 1 of this bill describes specifically the locus of litigation, section 2 should be eliminated or limited to lands "within the limits of any public reservation, park, road, street, avenue," for the sweeping words of the section otherwise clearly place the entire area of the District of Columbia held in private possession and title at the mercy of the United States. If there are certain instances where claim of ownership is now had of any part "of any public reservation, park, road, street, avenue," they should be made matter of special investigation and detailed report to Congress, so that all equities of the situation may be understood and a wrong be averted through the wisdom of the Congress in acting with full justice upon all the facts as they exist and are so presented.

II. Section 8 gives sweeping powers to "the officers of the United States" to acquire by suit or condemnation any lands in the District "needed for the use of the United States for any purpose whatever," and provides in detail the method of judicial procedure, which is most summary.

Hitherto all taking for public purposes has been authorized by specific acts of Congress, dealing directly with the special public purpose for which the property is desired, and the mode of taking, price to be offered, etc., has been the subject of specific direction in each act, according to the circumstances of each case. No reason is presented why this course of procedure should now be changed and blanket authority provided. The District Code (secs. 483, 491–491*a* to 491*g*), adopted after fullest consideration, provides by general law the mode of procedure in condemnation of land for public uses. Why should existing law be thus ignored?

III. The bill directs all suits by the United States instituted thereunder to be by bill in equity. Since the adoption of the Federal Constitution and the passage of the judiciary act of 1789 thereunder, the United States courts have

preserved in practice and procedure the sharp distinction between law and equity. Where title is attacked in ejectment the plaintiff must, of course, recover on the strength of his title and can not otherwise challenge the defendant's title. By this bill the United States is authorized to proceed in equity and call in any defendant to prove the strength of his title as against the sovereign. Why the rules of procedure which thus control individual suitors in the Federal courts should be thus changed in favor of the United States and a defendant in such suits put to affirmative proof of his title is not perceived. It is submitted that the form of action should depend on the nature of the case precisely as between private suitors and where the United States has "plain, adequate, and complete" remedy at law, equity should not be invoked to the detriment of the individual defendant.

Very respectfully, ALDIS B. BROWNE.

WASHINGTON, D. C., *February 15, 1911.*

The SUBCOMMITTEE ON THE DISTRICT OF COLUMBIA,
United States Senate.

GENTLEMEN: My attention having been called to the above-mentioned bill, I respectfully urge your subcommittee to make an unfavorable report upon it. In my opinion, there could be no excuse for placing upon the statute books, legislation so fraught with danger to the rights of private citizens.

The bill starts out, in section 1, by assuming that the United States has a right not only to the bed of the Anacostia River, the Potomac River, and Rock Creek, but to their shores, and to all submerged or partly submerged lands, and uplands adjacent thereto, including flats and marsh lands, and it proposes to authorize the commencement of suits, not for the purpose of determining whether such right exists, but "for the purpose of establishing and making clear the right of the United States thereto."

In other words, it assumes the claim of the United States to be a valid title and treats all rights of private citizens as mere clouds upon this title, to be gotten rid of in as summary a manner as possible.

This same unwarranted assumption of title is, by section 2, extended to practically every piece of land in the District of Columbia.

And by sections 3, 4, 5, and 6 a novel and summary method of extinguishing the rights of the private citizen is provided—a method which is avowedly devised for the purpose of depriving him of the protection which the law at present affords those in actual and bona fide possession of lands.

I understand that one of the main reasons assigned in support of this bill is the supposed necessity of providing the Government with some form of action better than those now provided by law for the trial of titles—some form of action in which the path of counsel acting for the Government would be made smooth and straight. These gentlemen complain that it is simply impossible for a jury to do justice to the Government; that where the Government is concerned juries will, if necessary, decide a case contrary to law in order to bring in a verdict against the Government; therefore they propose to abolish the common law right of trial by jury in this connection.

Such arguments are unworthy of serious consideration.

The right of trial by jury is guaranteed by the Constitution "in suits at common law where the value in controversy shall exceed twenty dollars." (See Constitution, U. S., Art. VII.)

Suits to try the title of real estate of which the defendants have possession are suits at common law. The action of ejectment is that provided by law for the settlement of such controversies.

Courts of equity have again and again refused to take jurisdiction for the very reason that the Constitution guarantees the person in possession the right of trial by jury. This has been clearly settled by decisions of the United States Supreme Court.

In the District, courts of equity have no jurisdiction to try titles to land where the defendant is in actual or constructive possession. The reason for this is that in such cases the remedy (namely the action of ejectment) has been found by the courts (including the United States Supreme Court) to be plain, adequate, and complete, and by the act of Congress establishing the Federal courts in accordance with the Constitution (Judiciary act of 1789. sec. 16, now sec. 723, R. S., U. S.) suits in equity "shall not be sustained in either

of the courts of the United States, in any case where plain, adequate, and complete remedy may be had at law." The only case in which, under the Constitutioin and laws enacted by Congress pursuant thereto, a court of equity is permitted to entertain a suit to try a title to real estate is where a party in possession, and claiming to own land, finds it necessary to appeal to the courts to quiet his title—that is, to determine whether there is any validity in the claim of some other person to the property. Here the court of equity is permitted to take jurisdiction for the reason that the action of ejectment can not be resorted to by the party in possession. (See the decision of United States Supreme Court in the case of Scott *v.* Neely, 140 U. S. Reports, pp. 106 to 117.) And see especially the decision of the same court in Whitehead *v.* Shattuck (138 U. S. Reports, pp. 146, 150, 151).

The foregoing decisions and many others which might be cited show how utterly contrary to the Constitution and to the scheme of our judiciary would be the summary proceeding provided in the first seven sections of this bill under consideration.

The sole reason why the representatives of the Government desire to proceed in equity seems to be to avoid a jury trial—the very thing the Constitution guarantees in such cases. Certainly if the claims of the Government to the land in question have any real foundation it should not fear to proceed in the same method it provides for the trial of the rights of its citizens. There is no just ground for the aspersion cast upon our local juries by counsel for the commission. Nor is there any ground for his expressed fear that local juries would decide such cases contrary to the principles of law applicable to them. In this District the court instructs the jury as to what is the law and if the jury disregard the law the verdict is set aside.

This fact was perfectly well known to counsel before his recent move to New York, practiced here, and probably in more than one instance procured verdicts to be set aside for that very reason.

Counsel further asserted that the action of ejectment was not a remedy at "common law;" that "common law" existed centuries before the action of ejectment was devised and brought into use in England; moreover, he called attention to the fact that in New York and some other States the tendency has been to do away with the distinction between law and equity.

Counsel neglected to state, however, that long before the separation of America from the mother country the action of ejectment had become a part of the common law and one of its most important parts; and long before that separation it was brought over and adopted by the Colonies as an essential part of their scheme of jurisprudence, which scheme was afterwards embodied in the National Constitution.

He further forgot to state that even in New York and other States where code practice is in vogue the Federal courts still maintain the same distinction between courts of law and courts of equity. It is believed, moreover, that even in those State courts where the distinction is abolished, the right of trial by jury in disputes over land titles is not only preserved in the cases where it existed prior to the abolition of the distinction, but is actually extended to such cases which were formerly brought in equity. Doing away with the distinction between "law and equity" does not mean the abolition of jury trials.

On grounds of convenience certainly the action of ejectment at law is rather to be preferred to a proceeding in equity. Proceedings in equity, involving, as they do, the taking of all testimony in writing, the filing of long bills, answers, and other pleadings, are in their nature burdensome and expensive. The ordinary charge of examiners in chancery for taking down and typewriting the testimony in equity cases is 25 cents per 100 words. In such litigation as that contemplated by the bill under discussion, not only would the expense of the Government be tremendous, but the burden upon private parties attempting to defend their rights would be oppression.

Many other considerations might be urged against the first seven sections of this bill, but lack of time forces us to devote the remainder of this communication to section 8.

By the admission of its advocates this section is foreign to the purpose of the rest of the bill. The only justification for it is the desire to relieve the executive department of the Government from the necessity of doing what every other purchaser of land in this District is called upon to do—satisfy himself as to the validity of the title of the person he is dealing with.

That the Government has and should have the right to take for public use such property of the private citizen as may be necessary, upon giving him just compensation therefor, is admitted; but that it should or can take property from one in possession of it, and then put upon him the burden of proving his title thereto, before giving him his just compensation, is denied. This is contrary to all ideas of justice. Even admitting that section 8 would permit it to be done in the original condemnation proceeding (which is by no means clear), it would involve him in expense of employing counsel, etc., and in the event of the existence of some slight defect, which in no way interfered with his possession and enjoyment, might subject him to interminable delay, or even defect, in his attempt to obtain that compensation guaranteed him under the Constitution.

Again, suppose a proceeding to condemn a tract of land composed of more than 60 different lots or parcels, such as that now pending in the supreme court of this District and known as district court No. 912, instituted under section 36 of the act of June 25, 1910, known as the omnibus public-building act. Suppose this proceeding to be governed by this section 8 of Senate bill 10136, how soon would the court be able to hear the evidence as to each one of these 60 or more titles and render judgment as to each one? Could the justice holding district court devote his whole time to the one case he might be able to do it in six months, but when we consider that dozens of other condemnation cases are pending at the same time, and that owing to his other court assignments (trial of criminal cases and appeals from municipal court) he is able to devote only a part of one day each week to condemnation cases, the result is apparent.

Moreover, consider the injustice likely to result from having 60 different titles, embodying 60 different states of fact, passed upon by one judge in one suit. A veritable "congeries of suits," as stated by the United States Supreme Court in Hale *v.* Allenson (188 U. S. Reports, pp. 56, 79), where the inconvenience and injustice of such proceedings is admirably demonstrated.

Another objection to section 8 is its omnibus character, authorizing proceedings to be commenced for the condemnation of any land, right, or easement therein without any requirement that Congress shall have previously appropriated money to pay for same, or even indicated that it approves the idea of acquiring the particular land or right mentioned in the proceedings. Thus the citizen may have his land tied up for months or years by condemnation proceedings, only to be informed in the end that Congress disapproves the project and refuses to appropriate the necessary funds. The financial ruin and the misery consequent upon the delays occurring in authorized condemnation proceedings are a faint indication of what might follow in the wake of such a statute as section 8 were its constitutionality to be upheld by the courts, which is very doubtful.

Further objections to section 8 might be pointed out but for lack of time. The whole bill is calculated to shake confidence in land titles in this District, with consequent depression of value. I earnestly urge that the bill be unfavorably reported, and that the Government be left to proceed in the modes already provided by its laws, which modes have the sanction of long usage and have hitherto proven sufficient.

In conclusion I beg to state that I neither own nor represent any property which, so far as I know, is likely to be affected by the pending bill. My opposition to it proceeds purely from a belief that it is unjust and oppressive legislation, which every good citizen should oppose.

Very respectfully,

FULTON LEWIS.

DEPARTMENT OF JUSTICE,
Washington, D. C., February 15, 1911.

Hon. E. J. BURKETT,
United States Senate, Washington, D. C.

DEAR SIR: In accordance with the understanding arrived at at the last hearing on Senate bill No. 10136, Mr. Gauss has held a conference with W. E. Edmonston, esq., and agreed with that gentleman on the terms of an amendment of the bill relative to notice.

The amendments to the bill, as developed by the hearings, are noted on the accompanying print of the bill, and are as follows:

Page 1, line 9, after the word "Columbia," strike out the following words, "within the limits of the city of Washington or exterior to said limits," so as to read "and to any part or parcel of the land or water in the District of Columbia composing any part of the Anacostia River," etc.

Page 2, line 12, after the word "been," strike out the words "fairly and equitably" so as to read "in all lands which have not been divided between the public and the original proprietors," etc.

Page 3, line 9, after the word "court" and before the word "and" insert the following: "In case said land is in actual adverse possession to the United States, notice shall be served on the parties in actual possession."

For the Attorney General.

Yours, very truly,

WILLIAM R. HARR,
Assistant Attorney General.

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